

2010
SENTENCING MANUAL

Gary M. Mandinach
California Appellate Project

California Appellate Project
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071
(213) 243-0300

Gary M. Mandinach
California Appellate Project

September 2010¹

I. APPRENDI, BLAKELY, BOOKER, BLACK, CUNNINGHAM

1. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the United States Supreme Court held that where the defendant waived trial and pled guilty, the trial court's upward departure from the sentencing range under *Washington* guidelines, based on facts not admitted by defendant or found by jury violated constitutional right to trial by jury within the meaning of *Apprendi*.
2. *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial and as a result does not violate *Apprendi*, *Blakely* or *United States v. Booker* (2005) 543 U.S. _____. The court also found that *Blakely* is not violated by the jury not deciding if a defendant should receive a consecutive sentence.
3. *United States v. Booker* (2005) 543 U.S.621, the Court addressed whether the Federal Sentencing Guidelines operated to violate the Sixth Amendment right to a jury trial.
4. *People v. Ferris* **NOT PUBLISHED ON THIS ISSUE:** (2005) 130 Cal.App.4th 773, the Fifth Appellate District held that *Apprendi*, which extending the defendant's right of trial by jury to all facts other than prior convictions, which might increase sentence above what would otherwise be the statutory maximum, does not alter the burden of proof on the question of insanity. California requirement that a defendant prove insanity by a preponderance of the evidence, is constitutional.

¹/ Always check to determine if the case has been granted review, depublished, or modified. Additionally, review the Three-Strikes Outline for all Three-Strikes related issues.

5. *People v. Buser* (2005) 132 Cal.App.4th 1188, the Third Appellate District held that the court did not violate the defendant's Sixth Amendment right to a jury trial by imposing an upper term sentence based on facts not proven to a jury beyond a reasonable doubt. The upper term, not middle term, is considered the maximum sentence (*People v. Black* (2005) 35 Cal.4th 1238, 1257), in limiting judicial authority to impose sentence in excess of what would otherwise be the maximum based on facts not determined by jury.
6. *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court held, in this 5-2 opinion, that in sentencing proceedings where the defendant had two prior convictions for robbery under Nevada law, and the elements of the Nevada crime differed from the elements of the California crime, in that the Nevada convictions did not qualify on their face as convictions for purposes of sentence enhancement under California's three strikes law, the trial court did not violate the defendant's federal constitutional right to jury trial in examining the record of the prior robbery convictions to determine whether each of the offenses constituted a conviction of a serious felony. The dissent contends, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, requires that the existence of any fact increasing a defendant's sentence beyond the statutory minimum be determined by the jury base on proof beyond a reasonable doubt. *Apprendi* indicates that its decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which found an exception to this rule to prove "facts of a prior conviction," is arguably incorrect. (*Apprendi, supra*, 530 U.S. at p. 489.) Given this statement, the dissent indicates that *Apprendi* should be construed narrowly, rather than in the expansive manner in which it continues to interpret the law. Given the fact that the defendant never admitted the *conduct* underlying his Nevada convictions that are now being used to increase his sentence, he should have been given a right to a jury trial on the issue. I predict the United States Supreme Court will grant certiorari either in this case or a related matter.
7. *People v. Jordan* (2006) 141 Cal.App.4th 309, the Sixth Appellate District held that the court did not abuse its discretion in imposing upper term sentence (see *People v. Black* (2005) 35 Cal.4th 1238), for second degree robbery on basis that numerous aggravating factors, such as prior convictions and indication of serious danger to

society, outweighed single mitigating factor of defendant's good performance on parole.

8. *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], the United States Supreme Court held that the California Supreme Court was once again wrong in a major sentencing determination when it decided, in a 6-3 opinion, *Blakely* does apply to the current California sentencing scheme, and as a result, that determinate by placing sentence-elevating factfinding within the province of the judge rather than the jury, violates the defendant's right to trial by jury under the Sixth and Fourteenth Amendments.
9. *United States v. Blanton* (9th Cir. 2007) 476 F.3d 767, the Ninth Circuit Court of Appeal held that the Fifth Amendment's Double Jeopardy Clause bars government from appealing a district court's allegedly erroneous denial of an Armed Career Criminal Act sentencing enhancement. Double jeopardy will attach if applicability of sentencing enhancement that would have increased the defendant's maximum sentence is not proven and the defendant is acquitted. There is a good discussion of *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 and its applicability following *Blakely v. Washington* (2004) 542 U.S. 296 wherein there is an argument that a nonjury juvenile adjudication could not be a predicate offense for the purpose of a federal sentencing enhancement because the underlying conduct was never proven to a jury. This case calls into question the viability of *Monge v. California* (1998) 524 U.S. 721 [that double jeopardy does not apply to enhancements]. Here the court says that the test is to look behind the labels to the constitutional commands governing the treatment of sentencing enhancements that increase the statutory maximum to which the defendant is otherwise exposed. To do otherwise is to undermine the 5th and 6th Amendments.
10. *People v. Hernandez* PETITION FOR REVIEW GRANTED, THEN DISMISSED, REMANDED TO THIRD DISTRICT: formerly at: (2007) 147 Cal.App.4th 1266, the Third Appellate District held that even under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], a defendant

is not entitled to have a jury determine the facts upon which the trial court relies to impose consecutive as opposed to concurrent sentences. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

11. *People v. Banks* REVIEW GRANTED, TRANSFERRED TO FOURTH APPELLATE DISTRICT DIVISION 3: FORMERLY AT: (2007) 149 Cal.App.4th 969, the Fourth Appellate District, Division 3 held that the court's finding that a combination of appellant's prior criminal history and "recidivist-related factors" could not stand to support the upper term as the trier of fact did not find them true beyond a reasonable doubt. As a result, the matter was remanded to the trial court for resentencing to determine if the upper term is warranted based on proof of appellant's prior criminal record alone.
12. *People v. Waymire* REVIEW GRANTED; DISMISSED: FORMERLY AT: (2007) 149 Cal.App.4th 1448, the Third Appellate District held that the court did not err in sentencing appellant to the upper term on methamphetamine manufacturing charge, after appellant violated probation. The Court of Appeal found no *Blakely/Cunningham* error in considering the fact that defendant's prior convictions were numerous and of increasing seriousness rather than simply the fact of a prior conviction. It was also not err in to rely on the unsatisfactory performance on probation where the defendant admitted he violated probation by failing to contact his probation officer, failed to participate in a substance abuse counseling program, and possessed methamphetamine. The court's reliance on the additional facts not admitted by the defendant nor proven to a jury beyond a reasonable doubt that the defendant was on probation at time of the offense was harmless beyond a reasonable doubt where the absence of those facts would not have made a material difference in court's determination. The court also found that there was no waiver or forfeiture, even though there was no objection in the trial court as the objection would have been futile.
13. *People v. Shadden* : REVIEW GRANTED, THEN DISMISSED: FORMERLY AT: (2007) 150 Cal.App.4th 137, the Fifth Appellate District held that the imposition of upper term based on facts found by judge rather than jury, following *Cunningham*, was not error where the court had exercised its discretion under *Romero*, to strike a

strike, and not impose a 25 to life term under the Three Strikes Law, which would have been a longer term of imprisonment than the imposition of the upper term.

14. *People v. Diaz* REVIEW GRANTED; TRANSFERRED TO SECOND APPELLATE DISTRICT, DIVISION 7: FORMERLY AT: (2007) 150 Cal.App.4th 254, the Second Appellate District, Division 7 held that appellate did not waive or forfeit his *Cunningham/Blakely* challenge to an upper term sentence due to his lack of objection where such objection would have been futile based on *Black*. The jury's implicit determination that the victim was incapable of resisting defendant's sexual advances due to intoxication or influence of a controlled substance could not be used both to find the defendant guilty of specific sexual offenses having use of intoxication, anesthesia or a controlled substance as an element and to find that defendant was "particularly vulnerable" for sentencing purposes. Judicial determination that crimes involved "great violence" and involved "great danger to society" because victim was forced into sex did not support upper term because such factors were inherent in the crimes themselves. Imposition of the upper term based on aggravating factors that might not have been found by reasonable jury was prejudicial. Imposition of consecutive sentences based on judge's finding that violent sex crimes were committed on separate occasions did not violate right to trial by jury where judge had the discretion to impose such sentences regardless of any judicial factfinding. Where the upper term sentence was reversed as violating right to trial by jury, and the court lacked discretion to impose upper term on remand because no aggravating factors were admitted by the defendant nor found true by the jury beyond a reasonable doubt, nor did the defendant have any prior convictions, trial court was required on remand to impose middle-term sentence.
15. *People v. Reyes* REVIEW GRANTED; DISMISSED: FORMERLY AT: FORMERLY AT: (2007) 150 Cal.App.4th 735, the Second Appellate District, Division 7, held that the court properly imposed the upper term within the meaning of *Blakely* and *Cunningham* for first degree burglary, forcible rape and forcible oral copulation counts where the defendant had at least three prior convictions, admitted multiple prior convictions on the stand, and admitted at trial

he had been in prison and had just been released at the time the present crimes were committed. The dissent by Justice Johnson would have sent the matter back to the trial court since multiple reasons were given for the upper term, and there was no showing, just as there were none in *People v. Banks* (2007) 149 Cal.App.4th 969, that the court necessarily would have imposed the upper term had it based its decision on the defendant's prior convictions alone.

16. *People v. Sayers* REVIEW GRANTED; TRANSFERRED BACK TO SECOND DISTRICT, DIVISION 4: FORMERLY AT: (2007) 150 Cal.App.4th 1040, the Second Appellate District, Division 4 held that there was no *Cunningham* error where, based in part on the defendant having engaged in a pattern of violent conduct which indicates a serious danger to society, a determination by the court based on defendant's past and current convictions and admission that he had served a prior prison term. The imposition of upper term based on judicial fact-finding, where erroneous, is not structural error and is subject to harmless-error analysis. (*Washington v. Recuenco* (2006) 548 U.S. [165 L.Ed.2d 466, 126 S.Ct. 2546].) The dissent by Justice Epstein indicated that the trial court considered factors that were not proper, and the Court of Appeal should not second-guess (see *People v. Benevides* (1998) 64 Cal.App.4th 728, 735 [appellate court's should not substitute their decision for that of the trial court]), what the court would have done if it knew it could only utilize recidivist factors.
17. *People v. Govan* REVIEW GRANTED; TRANSFERRED BACK TO FOURTH DISTRICT, DIVISION I. FORMERLY AT: (2007) 150 Cal.App.4th 1015, the Fourth Appellate District, Division 1 held that the imposition of upper term was error, based on *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], and *Apprendi v. New Jersey* (2000) 530 U.S. 466, where the defendant's prior convictions for crimes of increasing seriousness, his having committed the present offenses while on probation, and his unsatisfactory performance on probation, none of which was admitted to by defendant or found by a jury, violated his right to trial by jury. Merely because there was evidence from which a reasonable jury could necessarily have found aggravating factors does not render the judge's imposition of upper term based on that evidence harmless. (See *Washington v. Recuenco* (2006) 548

U.S. __; [165 L.Ed. 2d 466, 126 S.Ct. 2546, 2549-2553].) Additionally, the court held that the issue was not waived for failure to object.

18. *People v. Lozano* REVIEW GRANTED; DISMISSED. FORMERLY AT: (2007) 150 Cal.App.4th 1304, the Second Appellate District, Division 4 held that the court erred in basing an upper term sentence in part on nonrecidivist facts not submitted to a jury or admitted by the defendant is tested under the harmless error rule of *Chapman v. California* (1967) 386 U.S. 18. It is not a structural error requiring automatic reversal. (See *Washington v. Recuenco* (2006) 548 U.S.212; [165 L.Ed.2d 166, 126 S.Ct. 2546, 2549-2553].) The court erred in imposing upper term sentence for vandalism based not only on defendant's prior convictions but also on the circumstances of the crime itself. However, the error was harmless where the uncontested evidence showed defendant's vandalism consisted of multiple acts of damage to the victim's car, which individually were sufficient for a finding of malice to justify high term.
19. *People v. Fluker* REVIEW GRANTED; TRANSFERRED TO SECOND DISTRICT, DIVISION 7. FORMERLY AT: (2007) 151 Cal.App.4th 515, the Second Appellate District, Division 7 held that the court's imposition of upper term sentence based solely on its factual finding that defendant's conduct in the courtroom constituted an escape attempt or disruption, an aggravating circumstance that did not involve a prior conviction and was not admitted by defendant or to jury, violated defendant's constitutional right to a jury trial pursuant to *Cunningham*. The court also found that it was not harmless beyond a reasonable doubt within the meaning of *Chapman*.
20. *People v. Abercrombie* REHEARING GRANTED: FORMERLY AT: (2007) 151 Cal.App.4th 585, the Third Appellate District held that the court did not violate defendant's constitutional right to jury trial within the meaning of *Cunningham* by basing his upper term sentence solely on the fact that he was on parole when he committed the crime, as parole is a recidivism factor that necessarily arises from a prior conviction and relates solely to the defendant's status as a repeat offender. The court justified its decision based primarily on

Almendarez-Torres v. United States (1998) 523 U.S. 224 [140 L.Ed.2d 350].

21. *People v. English* (2007) 151 Cal.App.4th 1216, the Fifth Appellate District held that, within the meaning of *Cunningham*, that the imposition of the upper term without the jury findings as to aggravating factors did not violate the federal constitutional right to trial by jury where the judge found as an aggravating factor that defendant had “numerous” prior convictions beyond those for which enhancements were imposed, but the court also indicated that the cruelty of the current offense played a role in this decision. (See *People v. Gonzalez* (2006) 138 Cal.4th 932, 961, fn 6.) The court also hung its hat on the fact that *Cunningham* error is guided by the harmless beyond a reasonable doubt standard, which the court determined is the case here.
22. *People v. Morton* REVIEW GRANTED; DISMISSED: FORMERLY AT: (2007) 152 Cal.App.4th 323, the Fourth Appellate District, Division 3 held that the court’s imposition of the upper term did not violate *Cunningham*, where two of the three aggravating factors it found, first that the defendant had numerous convictions as an adult beyond those that were alleged, and, two that he was on parole at the time of the instant offense, fell within “prior conviction” exception. Any error in treating the defendant’s “unsatisfactory” prior performance on parole as a third aggravating factor was harmless in light of evidence that he committed several other crimes while on either probation or parole, and several additional parole and probation violations.
23. *Rita v. United States* (2007) 551 U.S. 338 [168 L.Ed.2d 203, 127 S.Ct. 2456], the United States Supreme Court held that the court of appeals may apply a presumption of reasonableness to a sentence within the sentencing guidelines. While the district judge must consider nonfrivolous arguments for downward departure, guidelines sentence will be deemed reasonable where the court has listened to each of defendant’s arguments and considered the supporting evidence before finding those circumstances insufficient to warrant a sentence lower than the guidelines range. A sentence of 33 months in prison for making two false statements to a grand jury was not unreasonably harsh where it was at the bottom of the guidelines

range, and the defendant's asserted grounds for departure, which included, poor health, fear of retaliation based on prior employment in law enforcement, and distinguished past military service, were not so compelling as to require a lesser sentence than would typically be imposed for those crimes.

24. *People v. Yim* (2007) 152 Cal.App.4th 366, the Second Appellate District, Division 6 held that the imposition of the upper-term did not violate *Cunningham* or the Sixth Amendment right to jury trial where it was based on the findings that the defendant was on parole at time of crime and performed poorly on parole. The Court of Appeal found that the prior conviction exception is not limited to the bare fact of a defendant's prior conviction, but, extends as well to the nature of that conviction, thereby permitting sentencing courts to determine whether the prior conviction is the type of conviction that renders the defendant subject to an enhanced sentence. (*People v. McGee* (2006) 38 Cal.4th 682, 704.)
25. *People v. Tillotson* REVIEW GRANTED; TRANSFERRED TO FOURTH APPELLATE DISTRICT, DIVISION 3. FORMERLY AT: (2007) 152 Cal.App.4th 799, the Fourth Appellate District, Division 3 held that convictions for multiple drug offenses in a single trial is subject to only one recidivist enhancement under Health and Safety Code section 11370.2, subd. (c), since the court classifies this as a status enhancement within the meaning of *People v. Tassell* (1984) 36 Cal.3d 77, 90 and *People v. Williams* (2004) 34 Cal.4th 397, 402.)
26. *People v. Velasquez* (2007) 152 Cal.App.4th 1503, the Second Appellate District, Division 7 held that the defendant forfeited his claim that the court's imposition of upper-term was improper because it did not state its reasons for selecting that term as he did not object in a timely manner. The court properly relied on fact that the defendant had served a prior prison term and that his prior adult convictions were numerous as aggravating factors in imposing an upper term for assault, along with a related firearm enhancement. Once again, there is a dissenting opinion on each of the above issues by Justice Johnson.

27. *People v. Cardenas* REHEARING GRANTED; REVIEW DENIED: NOW AT: (2007) 155 Cal.App.4th 14, the Second Appellate District, Division 7 held that imposition of the upper prison term based on the court's finding that crime involved planning and sophistication violated *Cunningham*.
28. *People v. Black* (2007) 41 Cal.4th 799, the California Supreme Court held that the defendant did not forfeit his right to challenge on appeal the imposition of the upper term sentence by failing in trial court to request a jury trial on aggravating circumstances. Imposition of an upper term sentence does not violate a defendant's Sixth Amendment right to a jury trial under *Cunningham*, where at least one aggravating factor has been established by the jury's verdict, the defendant's admissions, or the defendant's prior convictions. Neither *Cunningham* nor the relevant prior high court decisions apply to the imposition of consecutive terms.
29. *People v. Sandoval* (2007) 41 Cal.4th 825, the California Supreme Court held that the court violated the defendant's Sixth Amendment right under *Cunningham*, where it imposed upper term sentence for voluntary manslaughter citing aggravating circumstances that were based solely on the facts underlying the crime. Such facts included the fact that the killing involved a great amount of violence; the defendant engaged in callous behavior and lacked any concern regarding the consequences of her actions; the victims were particularly vulnerable because they were unarmed, inebriated, and ambushed from behind; defendant was the "motivating force" behind the crimes; and defendant's actions reflected planning and premeditation. The upper term was not based on the defendant's own admission, the jury's verdict, or any prior convictions. The error was not harmless beyond a reasonable doubt, warranting reversal of upper term sentence, especially where the jury rejected the prosecution's premeditation theory and found defendant guilty only of voluntary manslaughter indicates it would not have found the aggravating circumstances pertaining to her state of mind. However, on remand, the court has discretion to select either the upper, middle, and lower terms without requiring a finding of aggravating and mitigating circumstances. The trial court will be required to specify reasons for its sentencing decision, but, will not be required to cite "facts" that support its decision or to weigh

aggravating or mitigating circumstances. (See newly enacted Pen. Code § 1170, subd. (c).) The court's ruling will be subject to appeal for abuse of discretion. The court rejected the argument that the new scheme violates the prohibition of ex post facto laws. Unbelievably, the Supreme Court holds that since there is little impact on the defendant's sentence (see *Miller v. Florida* (1987) 482 U.S. 423 reversed the sentence based on an ex post facto violation), there is no ex post facto violation and this case is distinguishable from *Miller*.

30. *In re Christian G.* (2007) 153 Cal.App.4th 708, the Second Appellate District, Division 6 held that in calculating the theoretical maximum term of confinement for a juvenile for the purpose of committing him to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (formerly the California Youth Authority), the juvenile court properly considers the upper terms for both the underlying felony and any applicable enhancement, even if such terms could not be imposed on an adult offender in the absence of special jury findings. As a result, *Cunningham* and its progeny were not violated.
31. *In re Gomez* REVIEW GRANTED (S155425) FORMERLY AT: (2007) 153 Cal.App.4th 1516, the Second Appellate District, Division 2, held that *Cunningham* is not to be applied retroactively to upper term sentences on collateral review in cases already final when it was decided. The court found that the rule set forth in *Blakely* was neither a substantive rule nor a watershed rule of criminal procedure, and they follow that neither is *Cunningham*. (See *In re Consiglio* (2005) 125 Cal.app.4th 511, 514-516; *People v. Amons* (2005) 125 Cal.App.4th 855, 864-865; see also *Whorton v. Bockting* (2007) 549 U.S. 406, [167 L.Ed.2d 1, 127 S.Ct. 1173, 1180-1181].)
32. *In re Antonio P.* REVIEW GRANTED (156335) FORMERLY AT: (2007) 153 Cal.App.4th 1540, the Fifth Appellate District held that the juvenile court did not violate *Cunningham* by fixing the maximum term of confinement in excess of middle term for adult offender, where the additional period was imposed on basis of previously adjudicated offenses. The court did not rule on the other issues presented in *Cunningham*, *Black II*, or *Sandoval*.

33. *People v. Tu* (2007) REVIEW GRANTED (\$156995): FORMERLY AT: 154 Cal.App.4th 735, the First Appellate District, Division 4 held that where the defendant had prior sustained juvenile court petitions, the trial court's consideration of that record, plus other facts not determined by a jury in imposing upper-term sentence, did not violate defendant's federal constitutional right to a jury trial pursuant to *Cunningham*. The court also reiterated that from *Black II*, that 3 priors are numerous. (See *People v. Black* (2007) 41 Cal.4th 799.)
34. *People v. Retanan* (2007) 154 Cal.App.4th 1219, the Third Appellate District held that a court's finding that section 667.61, subd. (g), within the meaning of the "One-Strike" law, which provides that a single enhanced sentence shall be imposed for offenses committed against a single victim on a single occasion, does not apply to a particular case does not violate *Blakely*, nor do the consecutive sentences violate *Cunningham* or *Black II*.
35. *People v. Jefferson* (2007) 154 Cal.App.4th 1381, the Third Appellate District held that the court indicated that *Cunningham* and *Blakely* still recognize *Almendarez-Torres*, and therefore, *People v. Kelii* (1999) 21 Cal.4th 452, which holds that the court makes the determination whether the defendant's prior is a strike, has not yet been abrogated. Where the court agreed that the elderly victim enhancement within the meaning of section 667.9 should not be imposed because the defendant did not physically harm the victim, did not brandish or use the knife he had in his possession, and was motivated largely by his need for drugs, and because second-strike sentence would constitute sufficient punishment, enhancement should have been stricken rather than stayed (*People v. Lockett* (1996) 48 Cal.4th 1214), and there is no reason to remand to the trial court for further proceedings.
36. *People v. Munoz* (2007) 155 Cal.App.4th 160, the Third Appellate District held that where the defendant pleaded guilty to attempted murder and admitted possessing firearm during commission of offense in exchange for dismissal of numerous other charges, and the court, in sentencing the defendant to the upper terms on the offenses, relied on defendant's voluntary *Harvey* waiver. (See *People v. Harvey* (1979) 25 Cal.3d 754.) The defendant stipulated to the truth

of facts relevant to upper terms and allegations underlying the dismissed charges; as a result, the sentence did not violate defendant's Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt under *Cunningham*.

37. *People v. Ayala* REVIEW GRANTED AND DISMISSED: FORMERLY AT: (2007) 155 Cal.App.4th 604, the Sixth Appellate District held the imposition of upper term sentence under *Cunningham*, which was based on a judicial findings that the crimes involved "a high degree of callousness" and were carried out in a manner evidencing "planning and sophistication," violated his Sixth Amendment right to trial by jury, and the error was not harmless beyond a reasonable doubt where findings were based solely on brief recitations in a probation report.
38. *People v. Brock* REVIEW GRANTED AND DISMISSED: FORMERLY AT: (2007) 155 Cal.App.4th 903, the Second Appellate District, Division 8 held that the imposition of the upper prison term based on aggravating factors including prior prison terms, poor performance on parole, and abusing trust by failing to return to prison, justified the high term under *Cunningham* and *Black II*.
39. *People v. Grayson* REVIEW GRANTED (\$157952): FORMERLY AT: (2007) 155 Cal.App.4th 1059, the First Appellate District, Division 3 held that the court did not err by imposing the upper term sentence based in part on the court's finding that the defendant had prior juvenile adjudications. Those adjudications are equivalent to a criminal conviction, and once the court determined that the defendant has a prior conviction, it may consider other aggravating factors not found by the jury or admitted by the defendant. The court rejected the position taken in *Tighe* and *Nguyen* which would have prohibited the use of the juvenile prior as a strike or to justify the upper term. Statements in the presentence probation report constituted sufficient evidence of the defendant's juvenile adjudications where the defendant knew that such statements would be considered for sentencing purposes and did not challenge them in trial court.

40. *People v. Stevens* REVIEW GRANTED: FORMERLY AT: (2007) 156 Cal.App.4th 537, the First Appellate District, Division 4 held that the court's imposition of the upper term on furnishing a controlled substance to a minor in violation of Health & Safety Code section 11380, did not violate *Cunningham*. The defendant's criminal history and the jury's findings concerning the victim's vulnerability and exploitation of his position of trust based on the defendant's parental relationship with the victim were three aggravating circumstances, each of which satisfied Sixth Amendment requirements and rendered defendant eligible for upper term.
41. *People v. Gunter* REVIEW GRANTED AND DISMISSED: FORMERLY AT: (2007) 156 Cal.App.4th 913, the Second Appellate District, Division 7 held that appellant's federal constitutional right to a jury trial, within the meaning of *Cunningham* and *Black II*, was not violated where appellant's criminal history, namely his prior performance on probation and parole was unsatisfactory (rule, 4.421(b)(5)) and the fact that he had prior numerous convictions (rule, 4.421(b)(2)), made him "eligible" for the upper term pursuant to *Black II*.
42. *People v. Presley* (2007) 156 Cal.App.4th 1027, the Third Appellate District held that *Cunningham*, *Apprendi* and *Blakely* are not violated do to the fact that public notification requirements of the sex offender registration laws are not punishment (see *People v. Castellanos* (1999) 21 Cal.4th 254) for purposes of the Sixth Amendment, so the underlying facts need not be found by a jury.
43. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, the Fifth District held that the imposition of upper term does not under Sixth Amendment or *Cunningham*, *Black II* and *Sandoval*, require a jury findings where the term was based on prior felony and misdemeanor convictions.
44. *People v. Landaverde* (2007) 157 Cal.App.4th 28, the Second Appellate District, Division 4 held that the court did not deprive the defendant of his right to a jury trial pursuant to *Cunningham*, by imposing the upper term based on the defendant's admission that he had sexually molested his daughter over a continuous period. Even if the defendant was entitled to a jury trial on the sentencing, any

error was harmless since there is no reasonable doubt that jury would have found at least one of the aggravating factors on which the trial judge relied to be applicable, and making him eligible under *People v. Sandoval* (2007) 41 Cal.4th 825, and *Washington v. Recuenco* (2006) 548 U.S. 212 [165 L.Ed. 2d 466, 126 S.Ct. 2546, 2549-2553].

45. *People v. Lincoln* (2007) 157 Cal.App.4th 196, the Second Appellate District, Division 7 held that where the defendant's conviction on counts of attempted voluntary manslaughter were reversed, but convictions on counts of assault with a firearm were upheld and the matter remanded for resentencing on remaining counts, the court's imposition of the upper terms based on facts that were not found by jury, or admitted by defendant violated Sixth Amendment. Section 1170.1, subd. (d), which establishes presumption of middle term for enhancements, is unconstitutional under *Cunningham v. California* (2007) 549 U.S. 270 [127 S. Ct. 856], and trial court was required to proceed with resentencing on remand according to scheme set forth in *People v. Sandoval* (2007) 41 Cal.4th 825, meaning it must use recidivism as at least one of the factors for imposing the upper terms, if it does not, then the middle or lower term must be imposed.
46. *People v. Flores* (2007) 157 Cal.App.4th 216, the Fourth Appellate District, Division 3 held that the imposition of consecutive terms does not violate the defendant's Sixth Amendment rights because there is no requirement that the court find aggravating circumstances. (See *People v. Black* (2007) 41 Cal.4th 799, 821.)
47. *People v. Tillotson* (2007) 157 Cal.App.4th 517, the Fourth Appellate District, Division 3 held that given the fact that the court mentioned the defendant's numerous prior convictions as one of the reasons for imposing the upper term, it satisfied *People v. Black (II)* (2007) 41 Cal.4th 799, 815-816.)
48. *People v. Guess* REVIEW GRANTED AND DISMISSED: FORMERLY AT: (2007) 158 Cal.App.4th 283, the Sixth Appellate District, on a remand from the California Supreme Court, held that the imposition of upper prison term pursuant to *Black II* and *Sandoval* did not violate the defendant's right to a jury trial where the determination of the upper term was based in part on fact that defendant was on probation or parole at time of crime, and trial

judge stated that this factor alone was a sufficient basis to impose the upper term.

49. *In re Alex U.* (2007) 158 Cal.App.4th 259, the Fifth Appellate District held that *Cunningham* has no application to the juvenile court's determination of the theoretical maximum term of confinement. (See *In re Christian G.* (2007) 153 Cal.App.4th 708.) Any discrepancy between the theoretical maximum term as calculated by juvenile court and maximum term that could be imposed on an adult offender in absence of jury findings in aggravation does not violate equal protection guarantees since adult and juvenile offenders are not similarly situated for this purpose. (See *People v. Romo* (1975) 14 Cal.3d 189, 196; see also *In re Robert D.* (1979) 95 Cal.App.3d 767, 774-775.)
50. *People v. Curry* (2008) 158 Cal.App.4th 766, the Third Appellate District held that sentencing to upper term without permitting jury to decide aggravating factors beyond a reasonable doubt, pursuant to *Cunningham*, was error, but harmless since a jury would have been able to find at least one aggravating circumstance using a beyond a reasonable doubt standard.
51. *People v. Morton* (2008) 159 Cal.App.4th 239, the Fourth Appellate District, Division 3 held that the imposition of the upper prison term did not violate his right under *Black II* and *Sandoval* where based on three aggravating factors, (1) the existence of numerous prior convictions not otherwise used for enhancement, (2) the defendant's being on parole at the time of the offense, fall within the "prior conviction" exception to the jury right, and (3) that defendant's prior performance on parole was unsatisfactory, was beyond reasonable dispute.
52. *People v. Garcia* (2008) 159 Cal.App.4th 163, the Second Appellate District, Division 6 held that the imposition of the upper prison term did not violate the defendant's Sixth Amendment right to jury trial where his record of numerous, increasingly serious convictions and parole violations was an aggravating circumstance that warranted imposition of the upper term.

53. *People v. Superior Court (Brooks)* (2008) 159 Cal.App.4th 1, the Second Appellate District, Division 8 held that the prosecution may not amend the information to allege aggravating circumstances listed in California Rules of Court, Rule 4.421 to secure a jury trial of those alleged aggravating circumstances. Such a procedure, while a constitutionally permissible means of determining aggravating circumstances for sentencing purposes, is unauthorized by any statute or court rule. This court disagrees with the opposite conclusion drawn in *Barragan v. Superior Court* (2007) 148 Cal.App.4th 1478.
54. *People v. Stuart* (2008) 159 Cal.App.4th 312, the Third Appellate District held that it was not error under *Black II* and *Sandoval* for the court to impose the upper-term sentence for rape based on a finding of aggravated factors did not violate his constitutional rights under *Cunningham* where one legally sufficient aggravating circumstance was based on his record of prior convictions. The issue to be determined in each case is whether the trial court's fact finding increased the sentence that otherwise "could" have been imposed, not whether it raised the sentence above that which "would" have been imposed. (*People v. Black* (2007) 41 Cal.4th 799, 815.) Here the defendant had six prior misdemeanor convictions which qualified for the upper term under rule 4.421(b)(2), which are numerous and of increasing seriousness.
55. *People v. Abercrombie* REVIEW GRANTED AND DISMISSED: FORMERLY AT: (2008) 161 Cal.App.4th 68, the Third Appellate District held on rehearing, that it was not error under *Cunningham*, *Black II*, *Apprendi* and *People v. Yim* (2007) 152 Cal.App.4th 366, to impose the upper term do to appellant's parole status, which the court classified as a recidivist factor within the exception to *Cunningham* as set forth in *Almendarez-Torres v. United States* (1998) 423 U.S. 224 [140 L.Ed.2d 350].)
56. *People v. French* (2008) 43 Cal.4th 36, the California Supreme Court held that where the defendant challenged the court's imposition of an upper term sentence after he entered a plea of no contest pursuant to a plea agreement for a maximum term of 18 years, he did not need to obtain a certificate of probable cause under section 1237.5 since a certificate is not required when a defendant

only asserts errors in the proceedings conducted for the purpose of determining the degree of the crime and the penalty to be imposed, and defendant did not challenge the validity of the plea agreement. Where the defendant waived his right to a jury trial on the substantive charges against him, entered a plea of no contest, and stipulated to the factual basis for his plea, he neither waived his right to a jury trial on aggravating circumstances nor admitted facts that established an aggravating circumstance, thus imposition of an upper term sentence violated defendant's right to a jury trial. Because an express waiver of defendant's constitutional right was required, the defendant did not forfeit his claim challenging his aggravated sentence by failing to raise it in trial court, and the constitutional error was not harmless beyond a reasonable doubt. When asked by the trial court whether counsel believed there was a sufficient factual basis for the no contest pleas, counsel stated, 'I believe the People have witnesses lined up for this trial that will support what the D.A. read in terms of the factual basis, and that's what they'll testify to.' Indeed, counsel was careful to state that he agreed that witnesses would testify to the facts as recited by the prosecutor; he did not stipulate that the prosecutor's statements were correct. Under the circumstances of this case, defense counsel's stipulation to the factual basis cannot reasonably be construed as an admission by the defendant sufficient to satisfy the Sixth Amendment requirements established in *Cunningham*.

57. *People v. Garcia* (2008) 161 Cal.App.4th 475, the Second Appellate District, Division 1 held that in ruling on whether to grant discretionary relief from lifetime sex offender registration requirement, the court erred in its conclusion that it should not consider circumstances subsequent to defendant's conviction. *Cunningham* is not violated by the jury not deciding whether appellant should have to register.
58. *People v. Medrano* (2008) 161 Cal.App.4th 1514, the Third Appellate District held that where the court suspended an upper-term sentence after the defendant pled no-contest, but subsequently reinstated it after he was convicted for another crime, the defendant's objection to the imposition of the upper term within 60 days of reinstatement, rather than within 60 days of original sentencing, was timely. (*People v. Barnett* (1995) 35 Cal.App.4th 1, 2-3 [any other

determination of the issue would be premature].) The defendant's objection that the court's imposition of original sentence, which relied on facts which the court had originally relied upon, including the fact that the defendant had been on probation at time original crime was committed, violated his Sixth Amendment right to have facts found by jury was without merit where probation was evidence of other convictions, and defendant did not contest that he was on probation.

59. *In re Saade* REVIEW GRANTED (S164595) FORMERLY AT: (2008) 162 Cal.App.4th 1391, the Fourth Appellate District, Division 3, held that *Cunningham* does not apply retroactively to sentences for which all avenues of direct appeal have been exhausted under the *Teague v. Lane* (1989) 489 U.S. 288 formulation, which only permits retroactivity for new watershed procedural rules of law or new substantive rules of law, or under the *In re Johnson* (1970) 3 Cal.3d 404 formulation, which permits retroactivity for a new rule of law that "vindicat[es] a right which is essential to a reliable determination of whether an accused should suffer a penal sanction," since *Cunningham* does not shield a defendant from a wrongful conviction but only affected the manner in which a defendant's sentence is determined. Therefore, where the defendant's aggravated term sentence was final at the time *Cunningham* was decided, he is not entitled to habeas corpus relief.
60. *People v. Towne* (2008) 44 Cal.4th 63, the California Supreme Court held that the imposition of the upper term sentence based on an aggravating circumstance that the defendant served a prior prison term or was on probation or parole at the time the crime was committed does not, under Sixth Amendment, nor *Cunningham* and *Black II*, require a jury trial on the facts underlying the aggravating circumstance. With regard to imposition of upper term, the aggravating circumstance that the defendant's prior performance on probation or parole was unsatisfactory may be determined by a judge, so long as that determination is based upon the defendant's record of one or more prior convictions. Where the court has found an aggravating circumstance that permits imposition of an upper term sentence, it may exercise its discretion in favor of such a sentence based on a factual finding that is supported by substantial evidence, but is inconsistent with jury's verdict on other counts.

The court specifically disapproved of *People v. Takencareof* (1981) 119 Cal.App.3d 492, 498. As a result, the trial court did not commit statutory or constitutional error in finding, for sentencing purposes, that the victim was put in fear, even though the only offense of which he was convicted was “joyriding” and the defendant was acquitted of other charges involving force or fear as an element.

61. *People v. Miller* (2008) 164 Cal.App.4th 653, the Second Appellate District, Division 4 held that the trial court can sentence appellant under the new sentencing law, even though the offense occurred before it was announced since there is no ex post facto violation within the meaning of *People v. Sandoval* (2007) 41 Cal.4th 825, 857.
62. *People v. Wilson* (2008) 164 Cal.App.4th 988, the Third Appellate District held that the trial court did not err where it used the defendant’s multiple prior convictions and continued drug abuse as justifications for imposing an upper-term sentence within the meaning of newly amended section 1170, subdivision (b) (amended through SB 40), and the sentence did not infringe upon defendant’s constitutional right to jury trial pursuant to *People v. Black* (2007) 41 Cal.4th 799, 816 (*Black II*).
63. *People v. Esquibel* (2008) 166 Cal.App.4th 539, the Second Appellate District, Division 8 held that the imposition of upper prison term for assault with a firearm, based on aggravating factors found by judge rather than jury, violated defendant’s right to a jury trial, but the violation was harmless beyond a reasonable doubt where any reasonable jury would have found the same aggravating factors, that victims, unarmed persons fired upon without provocation while visiting a public park with their small children, were especially vulnerable, and that the crime involved a high degree of callousness and a high degree of violence. (*People v. Sandoval* (2007) 41 Cal.4th 825, 839.)
64. *People v. Ybarra* (2008) 166 Cal.App.4th 1069, the Fifth Appellate District held that where the trial court imposed the aggravated prison terms based upon multiple factors, only one of which was found by a jury, the defendant’s right to a trial by jury on the sentencing factors was violated, within the meaning of *Cunningham*, requiring

resentencing at which trial court would have discretion to impose any lawful sentence. The trial court's imposition of consecutive, rather than concurrent, terms based on judicial fact finding did not violate *Cunningham*. Trial court erred in imposing parole revocation fines on defendants whose sentences made them ineligible for parole. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183-1186.)

65. *People v. Baughman* (2008) 166 Cal.App.4th 1316, the Third Appellate District held that the imposition of the upper prison term on basis of aggravating factors in violation of *Cunningham*, was error, was harmless beyond a reasonable doubt where one of the aggravating factors was abuse of trust, and no reasonable juror would have found otherwise given that the defendant was the victim's father, that he repeatedly abused her, that the crimes were generally committed when other members of the household were away or asleep, and that defendant, when caught on one occasion, denied what he had done.
66. *People v. Mosley* REVIEW GRANTED (S168411): FORMERLY AT: (2008) 168 Cal.App.4th 512, the Fourth Appellate District, Division 3 held that the trial court erred where it, made its own finding and required the defendant who was convicted of an assault, after a jury acquitted him on a sexual assault charge, to register as a sex offender subject to Jessica's Law's restriction on residency. The Court of Appeal found that the restriction was a penalty, and not merely regulatory under *People v. Castellanos* (1999) 21 Cal.4th 785, because of its punitive effect, despite the lack of punitive legislative intent, wherein it increased the penalty for underlying offense, which was not sexually based, beyond the statutory maximum, requiring supporting facts to be found beyond a reasonable doubt by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.)
67. *People v. Rabanales* (2008) 168 Cal.App.4th 494, the Fourth Appellate District, Division 2 held that the defendant was not entitled to a trial by jury or a finding of guilt beyond a reasonable doubt on the question of whether he violated the conditions of his release under *People v. Vargas* (1990) 223 Cal.App.3d 1107, know as a *Vargas* waiver, whereby trial court reserved the right to impose

sentence in excess (e.g. 7 years) of that otherwise bargained for (e.g., one year county jail and 4 years suspended), if he violated specified conditions prior to sentencing. At a preliminary hearing the court found sufficient evidence that the defendant committed spousal battery based on the testimony of the victim, the mother of the defendant's children, by hitting her a couple of times, causing a black eye and injured ribs, together with corroborating testimony by witnesses who saw her injuries, was sufficient to support trial court's finding, of a violation of the *Vargas* waiver, and the condition that he commit no new crime, under a preponderance of the evidence standard, thereby permitting the increased sentence, and such a finding did not violate *Apprendi*, *Blakely* or *Cunningham*.

68. *Oregon v. Ice* (2009) 555 U.S. ____ [172 L.Ed.2d 517, 129 S.Ct. 711] the United States Supreme Court held that the Sixth Amendment within the meaning of *Apprendi* and *Blakely*, does not prohibit states from assigning finding of facts necessary to impose consecutive rather than concurrent sentences for multiple offenses to judges instead of juries.
69. *In re Gomez* (2009) 45 Cal.4th 650, the California Supreme Court held that *Cunningham* did not apply on collateral review of a judgment that became final before *Cunningham* was decided, but after *Blakely*, because *Cunningham* did not extend or modify the rule established in *Blakely*, but merely applied it to the California sentencing scheme. *Cunningham* applies retroactively to any case to which the judgment was not final when the decision in *Blakely* was issued.
70. *People v. Hamlin* (2009) 170 Cal.App.4th 1412, the Third Appellate District held that the trial court erred in imposing upper terms on the defendant's convictions for making a criminal threat and inflicting corporal injury on a spouse, pursuant to *Cunningham*, as there were no specific facts to justify the upper term for those acts.
71. *People v. Jones* (2009) 178 Cal.App.4th 853, the Fourth Appellate District, Division 2 held that imposition of the upper term based on aggravating factors listed in probation report did not violate *Cunningham*, where the sentence was based on statutory amendment to section 1170, subdivision (b), permitting trial court to exercise its

discretion in selecting upper, middle, or lower term. Application of amendment to Determinate Sentencing law to crime committed before amendment took effect did not violate constitutional prohibitions against ex post facto laws, nor did it prejudice defendant, who could have received upper term because one of the aggravating factors was that defendant was on probation when he committed the new crime.

72. *People v. Nichols* (2009) 176 Cal.App.4th 428, the Third Appellate District held that the court was not required under *Apprendi*, *Cunningham* or *People v. Jefferson* (2007) 154 Cal.App.4th 1381 to submit the issue of the prior prison term allegations (§ 667.5, subd. (b)) or the serious felony prior convictions (§ 667, subd. (a)(1)), to the jury.
73. *People v. Moberly* (2009) 176 Cal.App.4th 687, the Fifth Appellate District held that the imposition of the upper prison term for voluntary manslaughter plus the upper-term for a firearm enhancement based on same aggravating factor, that defendant was a prior convicted felon in possession of a firearm and ammunition, is not an unlawful dual use of facts; therefore the trial court can use the same factor to give the aggravated term on the substantive count, and on the enhancement as provisions on the use of the facts are limited under *People v. Scott* (1994) 9 Cal.4th 331, 350. Neither section 1170 nor the California Rules of Court attempts to provide an inclusive list of aggravating circumstances. Thus the trial court is free to base an upper term sentence upon any aggravating circumstance the trial court deems significant and is applicable to the matter. (See *People v. Sandoval* (2007) 41 Cal.4th 825.)
74. *People v. Pham* (2009) 180 Cal.App.4th 919, the Fourth Appellate District, Division 3 held that the upper term sentence, based on judge's finding that defendant took advantage of special position of trust, did not violate Sixth Amendment right to trial by jury where imposed under amended section 1170, subdivision (b), which eliminated midterm presumption and permits trial court to impose upper term without additional fact-finding. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 843-858.) Therefore, *Cunningham* and *Apprendi* do not apply.

75. *In re Watson* (2010) 181 Cal.App.4th 956, the Fourth Appellate District, Division 1 held that *Apprendi v. New Jersey* (2000) 530 U.S. 466 established a new rule of constitutional procedure which was the premise for the demise of California's determinate sentencing law in *Cunningham v. California* (2007) 549 U.S. 270, (at least until the enactment of SB 40.) Given the fact that the petitioner's conviction was still on direct appeal when *Apprendi* was decided, the upper terms imposed by the trial court, based on sentencing factors not found true by a jury beyond a reasonable doubt, were required to be reduced to no more than the middle term. The court also held that petitioner's claim was timely as he was sentenced under an unconstitutional statute. (*In re Robbins* (1998) 18 Cal.4th 770, 780 [pertaining to the timeliness of the petition and successive claims].)

II. CONSECUTIVE V. CONCURRENT SENTENCING

1. *People v. Hill* (2004) 119 Cal.App.4th 1192, the First Appellate District, Division 3, held that section 1170.1, subd. (a), which permits the court to impose consecutive prison terms for each subordinate term, and "shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses," gives the court the discretion to impose a gun-use enhancement equal to one-third the upper term for subordinate offense to which the enhancement applies. (See also *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1302.)
2. *People v. Griffin* (2005) 128 Cal.App.4th 1112, the First Appellate District, Division 3 held that section 12022.1 applies regardless of whether the offense in which bail was posted is alleged to have occurred in California or in another state. The sentence imposed for the crime committed while on bail must be imposed to run consecutive to the sentence imposed for the crime in which bail was posted.
3. *People v. Rodriguez* (2005) 129 Cal.App.4th 1401, the Fourth Appellate District, Division 2, held that the trial court erred when it believed that it did not have the discretion to impose concurrent terms for multiple convictions under the one strike law within the meaning of section 667.61.

4. *People v. Hernandez* (2007) **REVIEW GRANTED (S150038)**; formerly at: 146 Cal.App.4th 773, the Third Appellate District held that even under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856], a defendant is not entitled to have a jury determine the facts upon which the trial court relies to impose consecutive as opposed to concurrent sentences. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)
5. *People v. Lowe* (2007) 40 Cal.4th 937, the California Supreme Court held that where the defendant claims a speedy trial violation, he must establish that the delay harmed his ability to defend against the charged crime. Where the prosecution filed criminal charges against defendant, some five months earlier, but did not notify him thereof until he had completed a jail term in a neighboring county for a probation violation, and there was no evidence that delay impaired defendant's ability to defend against the charges, he could not establish prejudicial delay simply by showing that he lost the chance to serve any sentence stemming from the pending charges concurrently with the jail term he was already serving on the probation violation. The state right to a speedy trial arises upon the filing of the complaint, whereas the federal right comes into play when the information or indictment is filed. Here appellant had complaint of a violation under the state constitution. An uncommonly long delay triggers a presumption of prejudice under the federal constitution, but not under the state constitution. (*People v. Martinez* (2000) 22 Cal.4th 750, 756-766.) As a result of the foregoing, the decision in *People v. Martinez* (1995) 37 Cal.App.4th 1589, is overruled.
6. *People v. Mosley* (2007) 155 Cal.App.4th 313, the Second District, Division 5 held that where the defendant was convicted of multiple, in-custody offenses, including several counts of making terrorist threats and one count of possession of a weapon, and court designated one of the threats counts as the principal count, it was error to impose full-term consecutive sentence on the weapon count. Even though the defendant must be sentenced consecutively pursuant to section 4502, there is no term, unlike in section 667.6 that permits full term consecutive sentencing, and the sentence must be 1/3 the middle term on the consecutive sentence.

7. *People v. Tillotson* (2007) 157 Cal.App.4th 517, the Fourth Appellate District, Division 3 held that the matter must be remanded for the court to state its reasons for imposing enhancements under section 12022.1 consecutive. When prison sentences are imposed on multiple secondary offenses and one primary offense, section 12022.1 subd. (e) requires only the sentence on one secondary count to be imposed consecutively to the sentence on the primary count, and the court has the discretion to impose the sentences on the remaining secondary counts to run concurrently or consecutively.
8. *People v. Miller* (2008) 164 Cal.App.4th 653, the Second Appellate District, Division 4 held that to impose a consecutive sentence on the hit-and-run conviction based on the conclusion that the crime was of “great violence,” the trial court was required to specify the act or acts of violence to which it referred. The trial court can sentence appellant under the new sentencing law, within the meaning of *People v. Sandoval* (2007) 41 Cal.4th 825, 857.
9. *People v. Gamble* (2008) 164 Cal.App.4th 891, the Sixth Appellate District held that a consecutive prison term is not mandatory for a felony escape in violation of section 4532, subdivision (a)(1). A consecutive sentence is mandated under subdivisions (a)(2), (b)(1) and (b)(2) pursuant to the language of those sections, but that same language is not written into subdivision (a)(1), and subdivision (c) only applies to a sentence imposed under “that” subdivision, it is only discretionary to impose a consecutive sentence under subdivision (a)(1), and therefore, it must be remanded to the superior court for the court to exercise its discretion. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 912.) If the record had shown that the court would have not exercised its discretion, or would have been an idle act, then a remand would not have been necessary. (See *People v. Sanders* (1997) 52 Cal.App.4th 175, 178.)
10. *People v. Quintanilla* (2009) 170 Cal.App.4th 406, the Second Appellate District, Division 5 held that in and of itself, the age of the rape victim was an insufficient factor in aggravation to justify a sentencing enhancement where victim was 13. (See Calif. Rules of Court, rule 4.425(b)(3).) However, the victim’s age was relevant to the victim’s vulnerability and abuse of trust; therefore, the trial court did not abuse its discretion in finding the defendant’s exploitation of

the friendly relationship he maintained with victim's family, an aggravating factor. (See Calif. Rules of Court, rule 4.421(a)(3).) In finding that the defendant's acceptance of responsibility came only after trial, the court of appeal found that he was not being punished for going to trial. (*People v. Collins* (2001) 26 Cal.4th 297, 305-306.) Additionally, because of the defendant's escalating sexual violence and predation and his abuse of his relationship with victim as a friendly neighbor, the trial court reasonably viewed defendant as a serious sex offender and did not err in imposing a full consecutive sentence under section 667.6, subdivision (c) for defendant's rape and forcible lewd act convictions.

11. *People v. Goodliffe* (2009) 177 Cal.App.4th 723, the Third Appellate District, held that the "absurd consequences" exception to the plain meaning rule cannot be applied whenever it is claimed to run counter to a generalized legislative intent, general statement of electorate's intent "to strengthen and improve the laws that punish and control sexual offenders" will not trump plain meaning of section 667.6, subdivision (c), which provides that a "full, separate and consecutive term" may be imposed for each violation of an enumerated violent sexual offense involving the "same victim on the same occasion." The trial court erred in imposing full consecutive terms under that subdivision for offenses committed against separate victims. The court chose not to rewrite subdivision (c), to reinstate language that Jessica's law repealed. (*In re Water of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348; *People v. Skinner* (1985) 39 Cal.3d 765, 775 [the Court of Appeal does not rewrite unambiguous language].)

III. CRUEL AND UNUSUAL PUNISHMENT

1. *United States v. Barajas-Avalos* (9th Cir. 2004) 377 F.3d 1040, the Ninth Circuit Court of Appeal held that a thirty-year sentence for conspiracy to manufacture methamphetamine and attempting to manufacture methamphetamine did not constitute cruel and unusual punishment, even though defendant had never been convicted of a prior felony or crime of violence, given the seriousness of the crime, the quantity of drugs involved, the possession of the firearm during the commission of the crime, and his participation in an obstruction of justice.

2. *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, the Second Appellate District, Division 5, held that a defendant who contends that he is not subject to death penalty due to mental retardation (see section 1376), is entitled to a pretrial hearing before the court on that issue. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 319-321.) Where a defendant facing the death penalty claims mental retardation at the time of the act, the prosecution expert may conduct a pretrial examination of defendant, limited to tests reasonably related to a determination of mental retardation. The defendant is not entitled to unqualified judicial immunity for statements made in the course of the examination, but, possesses a statutory immunity at the guilt phase of the trial.
3. *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, the Ninth Circuit Court of Appeal held that a Three-strikes sentence of 25 years to life for theft of a VCR valued at less than \$200 violated the Eighth Amendment prohibition against cruel and unusual punishment as applied to appellant's current and prior offenses. Appellant had previously been convicted of two second-degree robberies, and neither involved weapons; minimal force to escape from each of the petty thefts was used by appellant. Appellant had pled guilty to the priors, which the trial court conceded were actually petty thefts for which defendant served 6 months in county jail and successfully completed the 3 year probationary term without incident. The current offense is a wobbler do to the prior theft offenses; and he had never been convicted of any other felony. The Ninth Circuit Court of Appeal found the California's appellate court's upholding of the 25 to life sentence, in which appellant must serve a minimum of 25 years (see *In re Cervera* (2001) 24 Cal.4th 1073), was an unreasonable application of controlling federal law, and therefore relief was possible under AEDPA in this "rare case" as a violation of the Eighth Amendment. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-77.)
4. *People v. Kellogg* (2004) 119 Cal.App.4th 593, the Fourth Appellate District, Division 1, held that it was not cruel and unusual punishment, under the Eighth Amendment, or *Robinson v. California* (1962) 370 U.S. 660, 666-667 or *Powell v. Texas* (1968) 392 U.S. 514, to conviction the defendant a chronic alcoholic, who was homeless, under section 647, subd. (f). The statute applies only if

publicly intoxicated person is unable to exercise care for his or her own safety or the safety of others, or is obstructing a public way, it does not punish the mere condition of being a homeless, chronic alcoholic, but rather punishes conduct posing a public safety risk.

5. *Rios v. Garcia* (Ninth Cir. 2004) 390 F.3d 1082, the Ninth Circuit Court of Appeal held that the habeas petitioner's sentence of 25 years to life in prison for petty theft of two watches worth less than \$80, based on his Three Strikes sentence, was not grossly disproportionate to his crime in light of his criminal history. (See *Ewing v. California* (2003) 538 U.S. 11.) This Court of Appeal distinguished *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, which held a 25 to life sentence for a theft of a VCR was grossly disproportionate to the crime, as the defendant surrendered without the use of violence, and the priors were two non-violent robberies. Here, petitioner struggled with the arresting security guard, and tried to avoid apprehension.
6. *Smith v. Texas* (2004) 543 U.S. 37 [160 U.S. 303, 125 S.Ct. 4000], the United States Supreme Court held that under Texas death penalty scheme, where the jury was instructed to determine whether the killing was deliberate and whether the defendant posed a continuing danger to others, and where the jury was not specifically instructed nor did the verdict form indicate that it could, even if it found for the prosecution on those two special issues, return a verdict for a sentence less than death if it found defendant's low IQ and placement in special-education classes to be sufficiently mitigating. As a result, the defendant was deprived of his right to consideration of mitigating evidence in violation of the Eighth Amendment, and the error was not cured by a general instruction to consider all mitigating evidence. (See *Penry v. Johnson* (2001) 532 U.S. 782 (*Penry II*).)
7. *People v. Poslof* (2005) 126 Cal.App.4th 92, the Fourth Appellate District, Division 2, held that the sentence of 27 years to life in prison for failure to register did not constitute cruel and unusual punishment in view of defendant's criminal history as a recidivist and child sex offender, nor did the lower court err in denying appellant's *Romero* motion pursuant to *People v. Williams* (1998) 17 Cal.4th 148, 161.

8. *In re Hawthorne* (2005) 35 Cal.4th 40, the California Supreme Court held that postconviction claims that a death sentence is cruel and unusual punishment as applied to a mentally retarded person should be litigated in substantial conformance with section 1376 which prescribes preconviction standards and procedures for determining whether a defendant against whom the prosecution seeks the death penalty is mentally retarded within the meaning of *Atkins v. Virginia* (2002) 536 U.S. 304.
9. *Roper v. Simmons* (2005) 543 U.S. 351 [161 L.Ed.2d 1, 125 S.Ct. 1183], the United States Supreme Court held that the Eighth and Fourteenth Amendments preclude imposition of death penalty on a person who was less than 18 years of age when crime was committed.
10. *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, the Ninth Circuit held that the lower court erred in denying a habeas petition based on a violation of the prohibition against cruel and unusual punishment, in this Three Strikes case, where the record did not reflect whether petitioner's most recent strike offense was a crime against persons or involved violence, and a remand for further development of the record was required. It is clear that the Eighth Amendment will only apply to Three Strike cases in "exceedingly rare" cases. (See *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 763 [appellant's conduct did not give rise to grave harm to society].)
11. *People v. Carmony* (2005) 127 Cal.App.4th 1066, the Third Appellate District held that a violation of section 290, for the failure to "update" sex offender registration within five working days of offender's birthday, where defendant had registered his correct address one month before his birthday and the parole agent knew that the defendant continued to reside at that address, was an offense so minor that there would be a violation of the prohibition against cruel and/or unusual punishment provisions of the United States and California constitutions, if a three-strike sentence was imposed. The majority of the court, in this 2-1 opinion, does an extensive analysis of the intrajurisdictional and interjurisdictional comparisons for both the state and federal standard, and the majority found that the sentence is clearly disproportionate by any measure. (Cf. *People v. Cluff* (2001) 87 Cal.App.4th 991, 1004.)

12. *Taylor v. Lewis* (9th Cir. 2006) 460 F.3d 1093, the Ninth Circuit Court of Appeal held that where the defendant's history of recidivism marked was by violence over a 30 year period, the lower court did not err, within the meaning of *Ewing v. California* (2003) 538 U.S. 11, and *Rummel v. Estelle* (1980) 445 U.S. 263, that a three-strikes sentence of 25 years to life for possessing 0.036 grams of cocaine did not violate the Eighth Amendment prohibition of cruel and unusual punishment.
13. *People v. Demirdjian* (2006) 144 Cal.App.4th 10the Second Appellate District, Division 4 held that a defendant's failure to object in the superior court to imposition of statutorily prescribed sentence, on grounds that it constitutes cruel and/or unusual punishment, does not preclude the Court of Appeal from entertaining the argument. Imposition of two consecutive 25-year-to-life sentences on a 15-year-old defendant did not violate the Eighth Amendment or similar California provision where terms were imposed for two horrendous murders in which teenage victims were bludgeoned to death. Proposition 21, permits the minor to be tried as an adult, and the imposition of a 25-year-to-life sentence, where defendant is between the ages of 14 and 16 and is charged with special circumstances murder.
14. *Kennedy v. Louisiana* (2008) 554 U.S. ____ [171 L.Ed.2d 525, 128 S.Ct. 2641], the United States Supreme Court held that the Eighth Amendment bars state from imposing the death penalty for the rape of a child because the death penalty is disproportionate to a crime where the crime did not result, or was not intended to result, in the victim's death based upon societal standards; capital punishment, where imposed for crimes against the individual, as opposed to crimes against the state such as treason and espionage, must be reserved for the "worst of crimes."
15. *People v. Cross* (2008) 45 Cal.4th 58, the California Supreme Court held that a surgical abortion, performed on a 13 year old girl, can support an enhancement under section 12022.7 for the defendant's personal infliction of great bodily injury in committing the offense that led to the victim's pregnancy, and that in this instance the pregnancy itself can constitute such great bodily injury. (See *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121, 1131-1132;

see also *People v. Sargent* (1978) 86 Cal.App.3d 150.) Where the 13-year-old victim became pregnant by her stepfather and carried the fetus for 22 weeks, the jury could reasonably have found that the victim suffered a significant or substantial physical injury. Where the trial court instructed the jury that “a pregnancy or an abortion may constitute great bodily injury” and did not instruct them on meaning of personal infliction the trial court did not err by failing to instruct on meaning of personal infliction, but the court erred in instructing the jury that an abortion may constitute great bodily injury, even though such statement was legally correct, because the defendant did not personally perform the abortion. Such instruction would not have misled the jury into concluding that the defendant inflicted great bodily harm by virtue of victim’s abortion by facilitating the victim in obtaining the abortion.

16. *Gonzalez v. Duncan* (9th Cir., 2008) 551 F.3d 875, the Ninth Circuit Court of Appeal held that where the defendant was convicted of failing to update his annual sex offender registration (see § 290, subd. (a)(1)(D), and, as a result of his priors, was sentenced to 28 years to life under the Three Strikes law, his sentence was grossly disproportionate to his offense, given the fact that he offense was a passive, harmless, and a technical violation where jury found the he had not moved, law enforcement was aware of his address, and he had registered at same address three previous times. The defendant’s failure to register could not have interfered with law enforcement’s ability to conduct surveillance and so the purpose of the registration requirement was not undermined by his technical offense; the offense resulted in no social harm and little or no moral culpability attached; and absent some connection between his prior offenses, the regulatory violation, and a propensity to recidivate, California’s interest in deterring and incapacitating recidivist offenders did not justify severity of sentence imposed.
17. *People v. Hamlin* (2009) 170 Cal.App.4th 1412, the Third Appellate District held that although the defendant had no criminal record and was a successful attorney, the facts of the case demonstrated that he was also capable of gross inhumanity for which he was neither remorseful nor contrite, and so his life sentence was not so disproportionate to defendant’s crime that it was cruel and unusual punishment, under either the California or federal constitutions.

18. *People v. Em* (2009) 171 Cal.App.4th 964, the Fourth Appellate District, Division 3, the majority of the court, over a strong dissent, held that the defendant's two consecutive 25-year-to-life sentences, for the felony murder, when the defendant was not the shooter, was not cruel or unusual punishment even though defendant was 15 years and nine months old at time of offense. The dissent argued that the consecutive sentences violated both the state and federal constitutions, wherein concurrent sentences would not.
19. *In re Nunez* (2009) 173 Cal.App.4th 709, the Fourth Appellate District, Division 3 held that life imprisonment without possibility of parole for kidnapping for ransom constituted cruel or unusual punishment pursuant to the state constitution, and the Eighth Amendment as applied to this minor defendant who was 14 years of age when crime was committed. The minor inflicted no injury on victim, and who was suffering from post-traumatic stress disorder at the time of the crime, where the minor did not have a significant criminal record, and the sentence was so disproportionate to those actually imposed on offenders of similar age who committed similar crimes in other jurisdictions as to be "freakishly rare."
20. *People v. Haller* (2009) 174 Cal.App.4th 1080, the Third Appellate District held that appellant's sentence of 78 years to life in prison on multiple counts of criminal threats, stalking, and assault with a deadly weapon, in this Three-Strike sentence, did not constitute cruel and/or unusual punishment under state and federal constitutions where the defendant caused serious emotional distress to multiple victims, was on probation for similar conduct at the time of the crimes, and had prior convictions for four felonies and a large number of misdemeanors, and the sentence was not disproportionate to those imposed on violent recidivists in other jurisdictions. Here the defendant will not be eligible for parole until he is 119 years old.
21. *People v. Nichols* (2009) 176 Cal.App.4th 428, the Third Appellate District held that a sex offender's indeterminate life sentence for failing to register within five days of changing his address (§ 290), did not constitute cruel and/or unusual punishment since the defendant thwarted of the purpose of registration, coupled with the seriousness of his prior convictions (three prior strikes), and his sustained criminality, all demonstrated his sentence was not grossly

disproportionate to his offense. The court concluded that this situation was more closely in line with *People v. Meeks* (2004) 123 Cal.App.4th 695 [life sentence for failure to register not unconstitutional], than the defendant's history and age of his priors in *People v. Carmony* (*Carmony II*) (2005) 127 Cal.App.4th 1066 [violation for failure to register was found unconstitutional].

22. *In re Coley* REVIEW GRANTED (S185303); FORMERLY AT: (2010) 187 Cal.App.4th 138, the Second Appellate District, Division 5 held that the defendant's 25 years to life sentence, under three-strikes law, for failure to update sex offender registration within five days of his birthday (see § 290, subd. (a)(1)(D), did not constitute cruel and unusual punishment, where his previous crimes were violent and callous, and where defendant's history of drug abuse and violent crime, as well as the fact that he was on parole, heightened public interest in having him timely register with authorities. This court disagreed with a contrary decision in *People v. Carmony* (*Carmony II*) (2005) 127 Cal.App.4th 1066 [a life sentence for failure to register was found unconstitutional]. This case presents the following issue: Does defendant's sentence of 25 years to life under the three strikes law for failing to update his sex offender registration within five days of his birthday constitute cruel and unusual punishment?
23. *People v. Mendez* (2010) 188 Cal.App.4th 47, the Second Appellate District, Division 2, held that a prison sentence of 84 years to life constituted cruel or unusual punishment where defendant was 16 years of age at time of crimes, and did not commit a homicide or inflict bodily injury. (*Graham v. Florida* (2010) __ U.S. __, [130S.Ct.2011; 176 L.Ed.3d 825].)

IV. CRC COMMITMENT

1. *People v. Fielder* (2004) 114 Cal.App.4th 1221, the Second Appellate District, Division 4, held, following a rehearing, that in order for prosecution to avoid application of the 5-year “washout” provision of for a one-year prior prison term within the meaning of section 667.5, subd. (b), the prosecution must prove beyond a reasonable doubt that the defendant either committed a new offense resulting in a felony conviction or was in prison custody during that period. The Court of Appeal also found that even though a CRC commitment is not a prior prison term, the conviction of the offense which sent appellant to CRC is a conviction that prevents the washout period from taking effect. However, given the fact that the documents presented to the court did not establish when the 1993 conviction, which led to one of the CRC commitments, was “committed,” the evidence was insufficient to establish that there was not a 5 year period leading up to the 1997 conviction when appellant was state prison free and felony conviction free. Therefore, the matter was remanded to the superior court to determine if the prior will be retried.
2. *People v. Chavez* (2004) 116 Cal.App.4th 1, the Fourth Appellate District, Division 1 held that the court did not err in failing to consider appellant for CRC based on a driving under the influence offense, with priors, which made the current offense a felony. Welfare and Institutions Code section 3051 that such a refer to CRC can be made if the defendant is addicted to or in imminent danger of being admitted to narcotics. Narcotic drugs are defined in Health and Safety Code section 11019, and it does not include alcohol.
3. *People v. Mitchell* (2004) 118 Cal.App.4th 1145, the Second Appellate District, Division 1, held that where a defendant is resentenced after being committed for treatment to California Rehabilitation Center, but being found ineligible for such commitment, do to a medical condition not treatable at CRC, was entitled to both pre-sentence good conduct credits afforded by section 4019 and post-sentence “worktime” credits afforded by section 2933, for the entire period between the original imposition of sentence and resentencing. (See also *People v. Nubla* (1999) 74 Cal.App.4th 719.)

4. *People v. Jeffery* (2006) 142 Cal.App.4th 192. The Second Appellate District, Division 6 held that the court's statement that it would not commit eligible defendant to California Rehabilitation Center for a "variety of reasons" did not comply with requirement of California Rules of Court, Rule 4.406(b)(9), that reasons be stated with specificity. The trial court may not "parrot" the statutory language when refusing to initiate commitment proceedings. (*People v. McGinnis* (2001) 87 Cal.App.4th 592, 595.) Given the fact that the court did not put on the record the necessary reasons, remand is required even if record would support denial.
5. *People v. Murray* (2007) 155 Cal.App.4th 149, the Fifth Appellate District held that where court suspended execution of sentence, and prison representative in other county notified probation officer that the defendant was incarcerated as a result of a subsequent conviction, the probation officer's failure to timely report the commitment to the court in accordance with section 1203.2(a), divested the court of jurisdiction to direct execution of suspended sentence. (See *People v. Holt* (1991) 226 Cal.App.3d 962, 967; see also *Pompi v. Superior Court* (1982) 139 Cal.App.3d 503, 507-508.) The purpose of section 1203.2a is to provide a mechanism by which the probationary court can consider imposing a concurrent sentence, and to preclude inadvertent imposition of consecutive sentences by depriving the court of further jurisdiction over the defendant when the statutory time limits are not observed. (*In re Hoddinott* (1996) 12 Cal.4th 992, 999.)
6. *People v. Sanders* (2009) 170 Cal.App.4th 1236, the Third Appellate District held that the defendant may waive his right under Welfare and Institutions Code section 3053 to a return hearing if he is not admitted to CRC. Where the defendant was fully informed on record that the trial court would not modify his sentence if he were excluded from CRC, even if the defendant were present at the return hearing, his request to modify the sentence previously imposed and stayed pending commitment would "fall on deaf ears," and so he did not suffer any injury and therefore could not demonstrate prejudice resulting from the waiver.

V. CREDITS

A. NO APPRENDI ON CREDIT LIMITATION UNDER 2933.1

1. *People v. Garcia* (2004) 121 Cal.App.4th, the Second Appellate District, Division 7, held that the court, during a sentencing hearing, makes the determination whether “another person, other than an accomplice, was present in the residence” during commission of first degree burglary, which makes the offense a “violent felony” (see § 667.5, subd. (c)(21)) to limit conduct credits to 15% within the meaning of section 2933.1. The Court of Appeal found that there is no federal or state constitutional right or state statutory right to a jury trial on this issue even after *Apprendi* as the limitation on credits does not add to the defendant’s maximum confinement time for the first degree burglary.

B. 2933.5 CREDITS (OR NOT)

1. *People v. Torres* (2005) 127 Cal.App.4th 1391, the Second Appellate District, Division 1, held that section 2933.5, subd. (a)(2)(O) prohibits an award of conduct credits to a defendant convicted of any felony in which the defendant personally inflicted great bodily injury, pursuant to section 12022.53 or section 12022.7, and applies only to a defendant who has previously committed two or more times, on charges brought and tried separately (§ 667, subd. (a)(1), and who has served two or more prison terms (§ 667.5, subd. (b)).

C. **2933.1 LIMITATIONS FOR VIOLENT AND
NON-VIOLENT OFFENSES**

1. *In re Reeves* (2005) 35 Cal.4th 765, the California Supreme Court held that where defendant was sentenced in single proceeding to prison term for a violent felony and to a concurrent term for other crimes which arose from a separate act, and pled to in a separate proceeding, the section 2933.1, subd. (a) 15% limitation on custody credits for violent felons applies only to term for violent felony and not to aggregate term. In other words, where the defendant completes the prison term for the violent offense, but remains incarcerated on the cases for which he is serving a concurrent sentence for the non-violent offense(s), he is entitled to the greater credit for the remaining period in which he is only serving time for the non-violent offense(s).
2. *People v. Nguyen* (2005) 130 Cal.App.4th 350, the Fourth Appellate District, Division Three held that the defendant's attempt to call her attorney during her arrest did not constitute an unambiguous invocation of her right to counsel under *Edwards v. Arizona* (1981) 451 U.S. 477, where the arresting officer made no attempt to interrogate. The police obtained a *Miranda* waiver prior to interrogation, but were not required to assume that purpose of call to the attorney was to obtain advice regarding the potential interrogation.
3. *In re Phelon* (2005) 132 Cal.App.4th 1214, the First Appellate District, Division 2, held that the court's staying of a count within the meaning of section 654, that involved a violent felony, precludes the Department of Corrections from applying the 15% credit limitation to the time appellant is to serve in state prison (see *In re Reeves* (2005) 35 Cal.4th 765), and the trial court correctly declined to apply the limitation to presentence credits for the same reason.
4. *In re Tate* (2006) 135 Cal.App.4th 756, the Fifth Appellate District held that consistent with *In re Reeves* (2005) 35 Cal.4th 765, that a prisoner who commits an in prison, non-violent crime, is entitled to earn 50% credits on that term after he has served the out of prison term for the violent crime which was limited to 15% pursuant to section 2933.1. Therefore, once the defendant has served the entire

term for the violent crime, any remaining time for the non-violent offense is served at 50% and not 15 %.

5. *In re Pacheco* (2007) 155 Cal.App.4th 1439, the Second Appellate District, Division 6 held that where the defendant was convicted of inflicting corporal injury on a cohabitant (§ 273.5), admitted the GBI enhancement under section 12022.7, subd. (a), and the court exercised its discretion to strike, in the interests of justice, the additional term for inflicting great bodily injury, but did not strike the GBI finding itself, the defendant was still subject to the 15% credits limitation for a violent felon pursuant to section 2933.1, rather than the 50 % allowed in the case of nonviolent felons which is what the section 273.5 offense is classified. The court rejected appellant's argument pursuant to *People v. Reeves* (2005) 35 Cal.4th 765, that section 2933.1, subd. (a) has no applicability if the defendant is not serving a term for a violent felony. The court simply found that it is the conviction, not the sentence, which effects the percentage of credits that can be earned.
6. *People v. Nunez* (2008) 167 Cal.App.4th 761, the Second Appellate District, Division 8 held that where the court sentences the defendant to concurrent state prison terms for two offenses, only one of which was a violent offense, 15 percent limitation pursuant to section 2933.1 for violent offenders, applied to both terms. The court drew from the Supreme Court's lack of criticism of *People v. Ramos* (1990) 50 Cal.App.4th 81 wherein that court held that the credit limitation applies to the offender, not the offense, supports this conclusion, and it is not determinative if the sentence is concurrent or consecutive for the 15% limitation to apply.
7. *People v. Kimbell* (2008) 168 Cal.App.4th 904, the Second Appellate District, Division 8 held that even though the trial court officially discharged the jury, after the jury had rendered its verdict under section 1164, then the prosecutor advised court that the jury was not waived for the trial on the defendant's prior convictions, and before the jurors had even left jury box, the trial court retained jurisdiction to reconvene the jury. If the verdict is incomplete or otherwise irregular, the court retains jurisdiction to reconvene the jury if the jury has not yet left the court's control. (See *People v. Hendricks* (1987) 43 Cal.3d 584, 597.) Additionally, the court held that

section 2933.1's 15% limitation on presentence custody credits is applicable only when defendant's felonies are listed as violent felonies, and since the defendant was not convicted of a crime listed as a violent felony under section 667.5, subdivision (c), appellant was awarded those credits under section 4019, and given his proper good/work time credits as calculated pursuant to *People v. Culp* (2000) 100 Cal.App.4th 1278.

8. *People v. Hamlin* (2009) 170 Cal.App.4th 1412, the Third Appellate District held that trial court did not err in applying 15 percent limit to time, pursuant to section 2933.1, deemed served on his misdemeanor convictions.
9. *In re Gomez* (2009) 179 Cal.App.4th 1272, the Fourth Appellate District, Division 3 held that where the court stays the sentence for the violent felony conviction of a crime that would qualify for credit limitation under section 2933.1 had it not been stayed behind other convictions, the defendant is not limited to the 85 percent credit limitation. Section 2933.1, subdivision (a) has no application to a prisoner who is not actually serving a sentence for a violent offense. (*In re Phelon* (2005) 132 Cal.App.4th 1214, 1219.)
10. *In re Pope* (2010) 50 Cal.4th 777, the California Supreme Court held that where the defendant pled guilty to gross vehicular manslaughter, a nonviolent felony, but also to two felony counts of alcohol-related driving and to great bodily injury enhancements, which turned them into violent felonies, appellant was subject to section 2933.1, subdivision (a)'s 15% limit on worktime credits, even though the court had stayed sentence on the two violent felonies pursuant to section 654. Section 2933.1, subdivision(a), which provides that it applies to "any person who is convicted of" a violent felony notwithstanding any other law, clearly and unambiguously constituted an exception to section 654 and applied to the defendant's vehicular manslaughter conviction.

D. PRESENTENCE CREDITS PER 2933.2

1. *People v. Reyes* (2008) 165 Cal.App.4th 426, the Second Appellate District, Division 8, held that section 2933.2, a statute effective June 3, 1998, depriving murder defendants of presentence conduct credits, does not apply to crimes committed prior to that date.
2. *People v. Johnson* (2010) 183 Cal.App.4th 253, the Third Appellate District held that the provisions of section 2933.2 which deny credits to those convicted of murder do not allow credits under sections 4019 and 2933, those provisions that concern conduct and work time credits. The trial court awards custody credits from the time of the defendant's arrest to the time he is remanded to state prison. Any additional time spent in county jail before delivery to the state prison, even for a motion to reconsider sentence, is calculated by the agency to which the defendant was committed. (§ 2900.5, subds. (b), (d), (e).)
3. *People v. Duff* (2010) 50 Cal.4th 787, the California Supreme Court held that section 2933.2 pertaining to presentence conduct credits to those convicted of murder applies to a defendant whose sentence for murder was stayed pursuant to section 654.

E. CREDITS ON PROBATION CASES

1. *People v. Gonzalez* (2006) 138 Cal.App.4th 246, the Sixth Appellate District held that where the defendant was arrested on new charge while on probation for a domestic violence case; probation was revoked in the domestic violence case as a result. Appellant completed his sentence on the domestic violence case, and remained in custody through the sentencing on the new case; custody and conduct credits, less those required to complete his sentence in earlier case, should have been granted against the new sentence and not the earlier case so as to avoid dead time. (See *People v. Marquez* (2003) 30 Cal.4th 14, 20-21 [unlike in *Bruner* and *In re Joyner* (1989) 48 Cal.3d 487, the choice is not between awarding credit one or twice, but awarding credit once so to avoid dead time].) By awarding all of the custody credits to the domestic violence case, the number of credits allocated exceeded the sentence imposed in that case. Therefore, the credits had to be reallocated so as to avoid dead time. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183.)
2. *People v. Turner* (2007) 155 Cal.App.4th 1432, the Third Appellate District held that probation conditions, (1) prohibiting defendant from associating with persons under age 18 is unconstitutionally vague and overbroad to the extent that it prohibited him from associating with such persons even if he did not know, and could not reasonably know, that a person was under that age. (See *In re Sheena K.* (2007) 40 Cal.4th 875); and (2) also vague and overbroad is the condition prohibiting the defendant from possessing sexually stimulating materials to the extent that it prohibited him from possessing materials without notice from the probation officer that specific materials were considered sexually stimulating. Additionally, the probation condition prohibiting defendant from patronizing places where sexually stimulating materials are available was vague and overbroad to extent it prohibited defendant from patronizing places that he did not know, and did not have reason to know, had such materials available.
3. *People v. Pruitt* (2008) 161 Cal.App.4th 637, the Second Appellate District, Division 7 held that where a probationer is arrested and jailed on a new offense, and thereafter the same conduct that led to the arrest is alleged in a probation violation, and probation is

revoked, and the violation is upheld after a hearing, and the previously stayed prison sentence is imposed (for the prior offense), the probationer is not entitled to credits pursuant to section 2900.5, subdivision (b) for the time spent in jail on the new charges, and prior to the summary revocation of probation. (See *People v. Huff* (1990) 223 Cal.App.3d 1100 [credit is precluded for the sentence in one offense when custody is solely attributed to another offense].) The Court of Appeal found that *Huff* did not conflict with *People v. Williams* (1992) 10 Cal.App.4th 827 or *People v. Bruner* (1995) 9 Cal.4th 1178 as this case and *Huff* are not “multiple restraint” cases.

4. *People v. Stump* (2009) 173 Cal.App.4th 1264, the Fourth Appellate District, Division 3 held that where the defendant engaged in a course of illegal conduct that encompassed certain independent acts, none of which were illegal per se but were a violation of his parole, in addition to driving while under the influence of alcohol, both Vehicle Code section 23152, subds. (a) and (b), the defendant did not show that “but for” having driven under the influence of alcohol he would not have been held in custody for the time in question and thus was not entitled to good conduct credit. (See *People v. Bruner* (1995) 9 Cal.4th 1178, 1192 [no credit unless the conduct leading to the sentence was a true and only unavoidable basis for the earlier custody].)

F. WAIVER ISSUES

1. *People v. Juarez* (2004) 114 Cal.App.4th 1095, the First Appellate District, Division 2, held that within the meaning of *People v. Johnson* (2002) 28 Cal.4th 1050, wherein the California Supreme Court held that a defendant's agreement to waive presentence credits is binding on the defendant even though he would serve more than the maximum time of confinement if sent to state prison, the lower court did not err as the record established that the trial court was fully acquainted with the defendant's case and made an informed decision to require the waiver of custody credits as a further incentive to complete his rehabilitation, trial court properly exercised discretion and did not require the waiver of time-served credits as part of any preconceived standard practice. Trial court may not routinely impose a term of probation conditioned on defendant's waiver of custody time credit but must exercise its discretion in determining when it is appropriate to do so.
2. *People v. Arnold* (2004) 33 Cal.4th 294, the California Supreme Court held that where the defendant knowingly and intelligently waives jail time custody credits (see *People v. Johnson* (1978) 82 Cal.App.3d 183), after violating probation in order to be reinstated on probation thereby avoiding a prison sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed. The court only dealt with the waiver of pre-sentence credits and whether the waiver will be applied to a subsequent state prison sentence.
3. *People v. Jeffrey* (2004) 33 Cal.4th 312, the California Supreme Court held that where the defendant knowingly and intelligently waives future credits to be earned in a residential drug or alcohol treatment facility, in order to be placed on probation (see *People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055), and thereby avoid a prison sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence is imposed. The result is consistent with the court's companion case in *People v. Arnold* (2004) 33 Cal.4th 294.
4. *People v. Hilger* (2005) 131 Cal.App.4th 1528, the Second Appellate District, Division 8, held, consistent with *People v. Jeffrey* (2004) 33 Cal.4th 312, and *People v. Arnold* (2004) 33 Cal.4th 294, where the defendant pled guilty and accepted probation offered by trial court

on the condition that he waive custody credits, the waiver applied to all forms of such credit, including credit for time spent in a treatment program, absent an express limitation placed on the scope of the waiver by the trial court or by the defendant. Additionally, the Court of Appeal found, also consistent with *Arnold, supra*, that the court need not advise the defendant that a “Johnson waiver” [defendant understands the waiver’s effect on his eventual sentence], applies to both county and state prison time. Here, the defendant did not expressly limit his waiver to county jail, therefore he is not entitled to recapture his custody credits to reduce his time in state prison.

5. *People v. Black* (2009) 176 Cal.App.4th 145, the Fourth Appellate District, Division 2 held that appellate was not entitled to section 4019 conduct credits or section 2900.5 credits for the time spent in a drug treatment program, given the waiver of those credits prior to entering the drug program, and there was insufficient proof to establish that the waiver was not voluntary nor based on counsel’s insufficient explanation of the waiver, so therefore, there was no IAC. (See *People v. Jeffrey, supra*, 33 Cal.4th at pp. 317-320.)

G. CUSTODY CREDITS WITHIN THE MEANING OF SECTION 2900.5 ARE AWARDED FROM THE TIME THE DEFENDANT IS OFFICIALLY BOOKED INTO CUSTODY

1. *People v. Ravaux* (2006) 142 Cal.App.4th 914, the Fourth Appellate District, Division 1 held that it was not error to deny the section 2900.5, subd. (a) credits, where the defendant is not in custody prior to being processed into a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution. The court awarded the correct number of custody credits to the defendant by calculating the credits beginning at the time he was booked into jail and excluding one additional day of custody credit for the time he spent in police custody prior to his official booking.

H. PRESENTENCE CREDITS WITH AN EXISTING INSANITY COMMITMENT

1. *People v. Callahan* (2006) 144 Cal.App.4th 678, the First Appellate District, Division 1 held that where the defendant was charged with a new criminal offense while confined in a state hospital on an insanity commitment, and was found incompetent to stand trial on that offense and received a new incompetency commitment, the defendant was not entitled to any custody credits against the new commitment because his liberty was already restrained by the insanity commitment regardless of pretrial confinement on the new charge and because there is no right to conduct credit for time spent in the nonpenal confines of a state hospital. Penal Code section 4019 just does not apply.
2. *People v. Mendez* (2007) 151 Cal.App.4th 861, the First Appellate District, Division 1, held that the court erred in awarding the defendant pre-sentence custody credits for time spent at state mental hospital prior to entering jail, where, even if the court had not ordered him committed based on mental incompetence, he would have been in the hospital pursuant to a civil insanity commitment stemming from previous unrelated charges. (See *People v. Callahan* (2006) 144 Cal.App.4th 678, 681-683.)
3. *People v. Bryant* (2009) 174 Cal.App.4th 175, the Second Appellate District, Division 5 held that where hospital staff reported that the defendant was competent to stand trial over two months before hospital's medical director certified defendant was competent to stand trial, equal protection principles under *People v. Sage* (1980) 26 Cal.3d 498, 502-503, warranted that "defendant be given conduct credits under section 4019, that would have been earned had he been returned [to] the county jail if a timely restoration certificate had been issued." (See *People v. Nubla* (1999) 74 Cal.App.4th 719, 731-732 [similar to being held in CRC, and then not accepted].)

I. HOME ELECTRONIC MONITORING CUSTODY CREDITS

1. *People v. McEwan* (2007) 147 Cal.App.4th 173, the Second Appellate District, Division 5 held that the superior court had no jurisdiction to consider an appeal by the defendant who pled no contest where no certificate of probable cause was obtained. The notice of appeal attacked the validity of the plea and did not state an intent to appeal on any grounds which did not require a certificate of probable cause. The defendant's motion to construe the appeal as addressing noncertificate grounds was not supported by a declaration from the defendant, trial counsel, or counsel for defendant on appeal. (See rule 8.54, subd. (a)(2).)

J. WHEN EITHER OR BOTH THE PROSECUTION AND THE COURT MISINFORMED THE DEFENDANT REGARDING HIS ELIGIBILITY FOR GOOD BEHAVIOR CREDITS, TELLING HIM HE WOULD RECEIVE 15% RATHER THAN 50% HE WAS ENTITLED TO, HIS DUE PROCESS RIGHTS WERE VIOLATED, AND THEREFORE, THE CONVICTIONS ARE REVERSED

1. *People v. Goodwillie* (2007) 147 Cal.App.4th 695, the Fourth Appellate District, Division 1, held that the court did violate the defendant's right to due process by misinforming him regarding his eligibility for good behavior credits, wherein he was entitled to 50% credits and not limited to 15% credits as he was told, under a plea bargain offered by the prosecution; where the record established that the defendant would have accepted the offer had he been accurately advised. Therefore, the prosecution is required to either reinstate plea offer or set the case for retrial.
2. *People v. Miralrio* (2008) 167 Cal.App.4th 448, the Third Appellate District held that even though the trial court and the prosecutor misadvised the defendant of the potential maximum sentence if he went to trial, it did not require reversal in the absence of the defendant showing a reasonable probability that he would have accepted plea offer had he been correctly advised. The court rejected appellant's reliance on *People v. Goodwillie* (2007) 147 Cal.App.4th 695 which held that the court did violate the defendant's right to due process by misinforming him regarding his eligibility for good behavior credits, wherein he was entitled to 50% credits and not

limited to 15% credits as he was told, under a plea bargain offered by the prosecution; where the record established that the defendant would have accepted the offer had he been accurately advised.

K. CRUZ WAIVER AND VARGAS WAIVER

1. *People v. Vargas* (2007) 148 Cal.App.4th 644, the Fourth Appellate District, Division 2 held that where the defendant entered a negotiated plea with a “Cruz waiver,” (*People v. Cruz* (1988) 44 Cal.3d 1247) which provided that he satisfy certain conditions, including appearance in court on sentencing date and obeying all laws, he would receive a specified sentence. However, if he violated one of the conditions he would receive the statutory maximum. The defendant did appear as scheduled, but by that time he had committed a new offense. Those facts did not preclude the court from imposing the maximum term sentence. Where the court had specifically advised the defendant that he would receive statutory maximum, not merely “up to” such maximum, if he violated the conditions set forth at the time of the plea, the court was not required to consider a lesser sentence following a violation. The court distinguished *People v. Jensen* (1992) 4 Cal.App.4th 978, and *People v. Morris* (1979) 97 Cal.App.3d 358, wherein the court unilaterally imposed a condition on the defendant’s plea agreement that the defendant had not negotiated with the district attorney, and therefore the defendant had not agreed upon. The Court of Appeal also found that the *Cruz* waiver bars the defendant’s assertion that the imposition of upper term based on facts found by judge rather than by jury did not violate *Cunningham*, *Jensen* or *Morris*.
2. *People v. Puente* (2008) 165 Cal.App.4th 1143, the Fourth Appellate District, Division 2 held that the trial court did not err in denying custody credits to defendant whose plea bargain included a “Cruz waiver,” (*People v. Cruz* (1988) 44 Cal.3d 1247, 1254 [the court can sentence defendant in excess of that agreed upon if he willfully fails to appear for sentencing]), where the credits were explicitly part of the waiver, and defendant violated the condition that he appear. Appellant contended that the trial court deprived him of due process by not providing him with notice that he allegedly violated the terms of his “Vargas waiver” (*People v. Vargas* (1990) 223 Cal.App.3d 1107, 1113 [defendant agreed to a specified prison term if certain

conditions were met and a longer specified term if they were not]), and by not stating a reason why appellant was found in violation of his *Vargas* waiver were not cognizable on appeal in absence of a certificate of probable cause.

L. HEROIC ACT STATUTE

1. *In re Young* (2004) 32 Cal.4th 900, the California Supreme Court held that a two-strike defendant, who unquestionably saved a state prison employee from choking to death, would qualify for a “reduction” in his term pursuant to section 2935, and that the “credit” limitation in section 667, subd. (c)(5), did not preclude such a reduction for this class of inmate. The term “credits” are different than the “reduction” of sentence pursuant to section 2935, and said section does not use the term “credits” in its provision.

M. SECTION 4019 CREDITS; PRESENTENCE CREDITS

1. *People v. Dieck* (2009) 46 Cal.4th 934, the California Supreme Court held that a defendant is entitled to seven days of presentence credits for the five days he spent in jail prior to sentencing (see § 4019, subds. (e) and (f) [“a term of six days will be deemed to have been served for every four days spent in actual custody”]) or only five days (see § 4019, subd. (e) [“No deduction may be made under this section unless the person is “committed” for a period of six days or longer”]). Section 4019 does not require that a defendant spend six days in presentence confinement in order to be entitled to receive conduct credit. (See *People v. Smith* (1989) 211 Cal.App.3d 523.) The statute entitles a defendant to conduct credit if he or she is “committed” for, a period of at least six days, without regard to the duration of presentence confinement.
2. *People v. Rodriguez* REVIEW GRANTED: (S181808) formerly at: (2010) 182 Cal.App.4th 535, the Fifth Appellate District held that the January 2010 amendments to sections 4019 and 2900.5, which contains no savings clause, may not be applied retroactively to defendants sentenced before amendment’s effective date. This court found that the legislature did not make a clear and compelling implication that the amendment should be applied retroactively as the Supreme Court ruled in *In re Estrada* (1965) 63 Cal.2d 740.

Such prospective-only application does not violate equal protection. A conduct credit statute within the meaning of *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn.3), because of its incentive effect, is legally distinguishable from statutes that reduce punishment in other ways.

3. *People v. Brown* REVIEW GRANTED: (S181963) formerly at: (2010) 182 Cal.App.4th 1354, the Third Appellate District held that the amendments to sections 4019 and 2900.5, may be applied retroactively to defendants sentenced before the amendments effective date. The legislation did not give a clear statement of legislative intent. However when looking at other cases pertaining to retroactive application of credits, namely *People v. Hunter* (1977) 68 Cal.App.3d 389, 392-393, and *People v. Doganiere* (1978) 86 Cal.App.3d 237 [*In re Estrada* (1965) 63 Cal.2d 740]) applied], it is clear that the credits should apply retroactively. Additionally, the Court of Appeal found that SB 18 was to address the fiscal emergency, which could partly be accomplished by lowering the prison population by applying more credits, and therefore earlier release of non-violent prisoners, the legislation was intended to apply retroactively.
4. *People v. House* (REVIEW GRANTED (S182813) formerly at: (2010) 183 Cal.App.4th 1049, the Second Appellate District, Division 1 held that the amended section 4019 is retroactive, and follows the rationale of *People v. Brown* (2010) 182 Cal.App.4th 1354, from the Third Appellate District and rejects *People v. Rodriguez* (2010) 182 Cal.App.4th 535, from the Fifth Appellate District. "When the Legislature amends a statute for the purpose of lessening the punishment, in the absence of clear legislative intent to the contrary, a criminal defendant should be accorded the benefit of a mitigation of punishment adopted before his criminal conviction became final. [Citation.]" (*In re Chavez* (2004) 114 Cal.App.4th 989, 999.) Applying the amendment prospectively does not address the fiscal emergency declared by the Governor.
5. *People v. Landon* REVIEW GRANTED (S182808) formerly at: (2010) 183 Cal.App.4th 1096, the First Appellate District, Division 2 held that the amendments to section 4019 which change the calculation of presentence conduct credits, applies retroactively.

This court expressly disagrees with *People v. Rodriguez* (2010) 182 Cal.App.4th 535, which held that the credits were prospective only.

6. *People v. Delgado* (REVIEW GRANTED) (S183663) formerly at: (2010) 184 Cal.App.4th 271, the Second Appellate District, Division 6 held that the defendant was entitled to the amendment to section 4019, for additional credits, where the amendment went into effect after she was sentenced. This is consistent with *People v. Brown* (2010) 182 Cal.App.4th 1354; *People v. House* (2010) 183 Cal.App.4th 1049; and *People v. Landon* (2010) 183 Cal.App.4th 1096.
7. *People v. Norton* REVIEW GRANTED (2010) 184 Cal.App.4th 408, the First Appellate District, Division 3 held that, consistent with *People v. Landon* (2010) 183 Cal.App.4th 1096, *People v. Brown* (2010) 182 Cal.App.4th 1354; *People v. House* (2010) 183 Cal.App.4th 1049; the defendant was entitled to retroactive application of amended section 4019.
8. *People v. Pelayo* REVIEW GRANTED (2010) 184 Cal.App.4th 481, the First Appellate District, Division 5 held that the defendant was entitled to retroactive application of the amended section 4019 for additional conduct credits where the sentence was not yet final on direct appeal at the time the amendment went into effect.
9. *People v. Otubuah* REVIEW GRANTED (2010) 184 Cal.App.4th 422, the Fourth Appellate District, Division 2 held that the amended version of section 4019 does not have retroactive application.
10. *People v. Hopkins* REVIEW GRANTED (2010) 184 Cal.App.4th 615, the Sixth Appellate District held that the amended version of section 4019 does not have retroactive application, and applies prospectively only.
11. *People v. Keating* REVIEW GRANTED (S184354); formerly at: (2010) 185 Cal.App.4th 364, the Second Appellate District, Division 7 held that the amendments to section 4019, which went into effect on January 25, 2010, and increased the good conduct credits available to a defendant for presentence custody in a local detention facility, apply to the defendant whose appeal was pending on that

date. The court follows all of those other cases that find the amendment apply retroactively and not merely prospectively.

12. *People v. Weber* REVIEW GRANTED (S184873); formerly at: (2010) 185 Cal.App.4th 337, the Third Appellate District held that the amendment to section 4019 applied retroactively and applied to appellant. (See *People v. Brown* (2010) 182 Cal.App.4th 1354.)
13. *People v. Euseblo* REVIEW GRANTED (S184957); formerly at: (2010) 185 Cal.App.4th 990, the Second Appellate District, Division 4, line up with the cases that indicate that the amendment to section 4019 do not apply retroactively in the award of presentence credits.
14. *People v. Bacon* REVIEW GRANTED (S184782); formerly at: (2010) 186 Cal.App.4th 333, the Second Appellate District, Division 8 held that the amendments to section 4019 applied retroactively and applied to appellant.
15. *People v. Jones* (2010) 188 Cal.App.4th 165, the Third Appellate District held that where the defendant has suffered a prior serious felony conviction, and trial court strikes the conviction for enhancement purposes pursuant to section 1385, trial court may, but is not required to, also strike the prior for purposes of amended section 4019 making him eligible for additional sentencing credits. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1193 [a prior serious felony conviction absolutely denies a defendant an opportunity for probation, and therefore is an increase in penalty].) A defendant whose prior serious felony enhancement was stricken under section 1385, and who was sentenced before section 4019 was amended, is entitled to remand so court may exercise discretion as to whether to strike the prior for purposes of amended statute.

VI. ENHANCEMENTS AND PENALTY PROVISIONS

A. DISCRETION/1385 TO STRIKE THE ENHANCEMENT

1. *People v. Carmony* (2004) 33 Cal.4th 367, the California Supreme Court held that the lower court's decision not to strike a strike is reviewed under the deferential abuse of discretion standard. The High Court overruled *People v. Benevides* (1998) 64 Cal.App.3d 728, to the extent that it is inconsistent with this opinion. The High Court found that the refusal to strike such an allegation, in this case where the defendant was convicted of failing to register as a sex offender, was not an abuse of discretion do to the fact the he had been informed of his duty to register on several occasions, had a lengthy and violent criminal record, which included two prior convictions for failing to register, had substance abuse problems for which he did not diligently seek treatment, had a spotty work history, and appeared unlikely to be law-abiding in the future.
2. *People v. Wallace* (2004) 33 Cal.4th 738, the California Supreme Court held that where the defendant pled no contest to a pending charge and admitted a prior conviction, the court's order that the prior conviction allegation be stricken pursuant to section 1385, primarily because the magistrate, after conducting the preliminary hearing, had held that there was insufficient evidence to hold the defendant to answer on that charge, a charge which was later reinstated and to which the defendant entered a negotiated plea, was based on a factor extraneous to the Three Strikes law and was an abuse of discretion within the meaning of section 1385.
3. *People v. Burgos* (2004) 117 Cal.App.4th 1209, the Second Appellate District, Division 2, held that the lower court abused its discretion in denying the defendant's motion to strike one of two prior felony convictions under section 1385 where: (1) both arose from the same act, (2) an express statutory preclusion barred imposition of sentences for both, and (3) the defendant's other prior criminal history consisted of several misdemeanors and a felony conviction for sale of a substance in lieu of a controlled substance. Appellant's current offense was an assault and robbery in which defendant injured and took the shoes of another detainee in his holding cell, and as a second-strike offender defendant would still

face a term as long as 20 years. The prior offenses arose from one act, wherein appellant was convicted of attempted carjacking and attempted robbery, and section 654 was applied at the time of sentence. Here, the Court of Appeal analyzes *People v. Benson* (1998) 18 Cal.4th 24 and *People v. Sanchez* (2001) 24 Cal.4th 983, 993, wherein the High Court indicated that there are certain circumstances, wherein the prior convictions are so closely related, that it would be an abuse of discretion not to strike a strike—that is the rationale that this Court of Appeal applied in this case.

4. *People v. Poslof* (2004) 119 Cal.App.4th 215, the Fourth Appellate District, Division 2, held that the sentence of 27 years to life in prison for failure to register did not constitute cruel and unusual punishment in view of defendant's criminal history as a recidivist and child sex offender, nor did the lower court err in denying appellant's *Romero* motion pursuant to *People v. Williams* (1998) 17 Cal.4th 148, 161.
5. *In re Carlos E.* (2005) 127 Cal.App.4th 1529, the Fifth Appellate District held that Welfare and Institutions Code section 731, subd. (b), alters the method for determining the maximum term of confinement in the California Youth Authority as of January 1, 2004. Thereafter, the juvenile court has the discretion to set the maximum term of confinement based on the facts and circumstances placing the minor before the court, but the term cannot exceed the maximum time prescribed by adult sentencing law.
6. *In re Jacob J.* (2005) 130 Cal.App.4th 429, the Third Appellate District held that Welfare and Institutions Code section 731, subd. (b) grants juvenile court discretion to set the maximum term of physical confinement to California Youth Authority in a given case at less than the adult maximum term of imprisonment. The failure of court to exercise its discretion requires the matter be remanded for another determination of the issue.
7. *People v. Flores* (2005) 129 Cal.App.4th 1401, the Fourth Appellate District, Division 3 held that under section 1385, the court has the power to dismiss or strike an enhancement. The failure to impose or strike the enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. (*People v. Bradley* (1998) 64

Cal.App.4th 386, 391.) Striking of an enhancement is tantamount to a dismissal, and implies that it must be dismissed in the interest of justice. (See *People v. Carrillo* (2001) 87 Cal.App.4th 1416, 1421.)

8. *In re Large* (2007) 41 Cal.4th 538, the California Supreme Court held that the fact that the court denied petitioner's original petition for writ of habeas corpus, pursuant to *Romero*, which asked for dismissal of one or more of his prior strike convictions, but at a new hearing three years later, based on the same information available at the first hearing, struck petitioner's prior conviction for first degree burglary and resentenced him to lesser term, did not demonstrate that the court's original ruling, which was reinstated by the court of appeal after it reversed the later order, was reached in an improper manner. The supreme court held that petitioner failed to overcome the strong presumption under *People v. Carmony* (2004) 33 Cal.4th 367, 378, that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation.
9. *People v. Garcia* (2008) 167 Cal.App.4th 1550, the Second Appellate District, Division 5 held that, where the court imposed indeterminate sentences, based on multiple offenses, some being serious felonies, and priors that made him eligible for a three strike sentence, and the fact that the jury also found that he had served five prior prison terms, and personally used a firearm in commission of all offenses, except a firearm possession by felon, the court was required to exercise its discretion and either impose one-year prior prison term enhancements pursuant to section 667.5, subdivision (b), on every appropriate count, depending on whether each offense was a "serious felony," (see *People v. Williams* (2004) 34 Cal.4th 401-405; *People v. Misa* (2006) 140 Cal.App.4th 837, 845-846), or strike the enhancements pursuant to section 1385, subdivision (a). (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396; see also *People v. McCray* (2006) 144 Cal.App.4th 258, 267.)

B. TO STAY OR TO STRIKE AN ENHANCEMENT

1. *People v. Crites* (2006) 135 Cal.App.4th 1251, the Second Appellate District, Division 6 held that where two special allegations within the meaning of section 12022, subd. (b) (knife and steel-toed shoe) that defendant used a deadly or dangerous weapon during commission of a violent felony were found true, the trial court properly imposed the first enhancement and stayed the second. (See *People v. Jones* (2000) 82 Cal.App.4th 485, 492-493.) The second enhancement was authorized by law, therefore the court was not required to strike it, and could validly stay it.
2. *People v. Jones* (2007) 157 Cal.App.4th 1373, the Second Appellate District, Division 7 held that the court's discretion to strike a sentence enhancement, pursuant to section 1385, includes discretion to striking a deadly weapon enhancement under section 12022, subd. (b)(1). The rationale is similar to that used by the Supreme Court in *People v. Meloney* (2003) 30 Cal.4th 1145, 1156.) As a result of the court "uniformed discretion," it must be remanded for resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.8; *People v. Meloney, supra*, 30 Cal.4th at p. 1165.)
3. *People v. Garcia* (2008) 167 Cal.App.4th 1550, the Second Appellate District, Division 5 held that, where the court imposed indeterminate sentences, based on multiple offenses, some being serious felonies, and priors that made him eligible for a three strike sentence, and the fact that the jury also found that he had served five prior prison terms, and personally used a firearm in commission of all offenses, except a firearm possession by felon, the court was required to exercise its discretion and either impose one-year prior prison term enhancements pursuant to section 667.5, subdivision (b), on every appropriate count, depending on whether each offense was a "serious felony," (see *People v. Williams* (2004) 34 Cal.4th 401-405; *People v. Misa* (2006) 140 Cal.App.4th 837, 845-846), or strike the enhancements pursuant to section 1385, subdivision (a). (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396; see also *People v. McCray* (2006) 144 Cal.App.4th 258, 267.)
4. *People v. Bonnetta* (2009) 46 Cal.4th 143, the California Supreme Court held that it is mandatory that the trial court's reasons for

dismissing an enhancement in furtherance of justice under section 1385 must be explained “in an order entered upon the minutes,” and the clerk’s failure to do so nullifies the dismissal, even if the reasons appear elsewhere in the record. The prosecutor does not waive the section 1385 error, under *Scott*, by failing to inspect the minutes after the sentencing error. Where the trial court erroneously failed to explain its reasons for dismissal in the minute order, the proper remedy was to remand the matter with directions to the trial court either correct the error by again ordering dismissal of the enhancement, setting forth its reasons in a new minute order, or it can decide to reconsider its decision and take appropriate action including, if necessary, proceeding as if the order had not been entered in the first instance.

C. GANG ENHANCEMENTS SECTION 186.22 AND RELATED ISSUES

1. *People v. Hernandez* (2004) 33 Cal.4th 1040, the California Supreme Court established that the defendant who was charged with a robbery for the benefit of a criminal street gang, within the meaning of section 186.22, subd. (b)(1), under the facts of this case, which do not necessarily establish the mental state in which the underlying offense was committed, was not error, not to bifurcate the enhancement. (See generally *People v. Calderon* (1994) 9 Cal.4th 69, 72-78 [re bifurcation of prior conviction enhancements, which had previously overruled *People v. Bracamonte* (1981) 119 Cal.App.3d 644].) The denial of the motion to bifurcate the street-gang enhancement was not an abuse of discretion where evidence of gang affiliation was also relevant to prove motive and intent behind the charged offenses, and the evidence which was admissible to prove the gang affiliation, but would have been inadmissible at trial solely on the charged offenses was not particularly inflammatory. The High Court found that if there was a request for a limiting instruction on the proper use of the gang enhancement it should be given, but given the fact that none was requested in this case, it was not error, and the danger that the jury would use such evidence improperly was not so great as to impose upon court a duty to give the instruction sua sponte.

2. *People v. Ramos* (2004) 121 Cal.App.4th 1194, the Second Appellate District, Division 3, held that the court erroneously imposed a 15-year enhancement under section 186.22, subd. (b)(5), rather than requiring service of a 15-year minimum eligible parole date, and also erroneously imposed a consecutive subordinate term under section 1170.1, subd. (a), which does not apply to indeterminate sentences. (See *People v. Felix* (2000) 22 Cal.4th 651, 659; *People v. Mason* (2002) 96 Cal.App.4th 1, 15.)
3. *People v. Briceno* (2004) 34 Cal.4th 451, the California Supreme Court held that when an “enhancement” within the meaning of section 186.22, subd. (b)(1) is found true, section 1192.7, subd. (c)(28) does transform the underlying offense of either section 12021, or 12025 into serious felonies. As a result, they do qualify as strikes or prior serious felony enhancements, in the future, and they would be serious felonies within section 667, subd. (a)(1). Therefore, any felony offense that was also committed for the benefit of a criminal street gang within the meaning of section 186.22, subd. (b)(1) is a serious felony pursuant to section 1192.7, subd. (c)(28) for future or later enhancing purposes.
4. *People v. Martinez* (2004) 116 Cal.App.4th 753, the First Appellate District, Division 1 held that the court erred by ordering appellant to register as a gang member under section 186.30 which requires proof that the crime was committed in association with, or for the benefit of a criminal street gang, and such cannot be inferred solely from the defendant’s past associations and activities, nor can it be inferred from the fact that the defendant acted with a companion absent evidence that the companion was a gang member. Given the fact that registration is an onerous burden that may result in a separate misdemeanor offense for noncompliance, a registration requirement may not be imposed upon persons not specifically described in the statute. (See *People v. Franklin* (1999) 20 Cal.4th 249, 253; *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 623.) For the crime to be gang related the record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.

5. *People v. Vy* (2004) 122 Cal.App.4th 1209, the Sixth Appellate District held that three violent assaults by the defendant's gang, including the crime for which he was sentenced, over less than a three-month period, constituted sufficient evidence that the commission of such predicate crimes was one of the "primary activities" of the defendant's gang, supporting imposition of the enhancement under section 186.22, subd. (f). The court did not commit instructional error by including attempted murder as a predicate crime that the jury could consider for "primary activities" prong of gang enhancement.
6. *People v. Lopez* (2005) 34 Cal.4th 1002, the California Supreme Court held that a defendant convicted of first degree murder, which is punishable by imprisonment for life and therefore is not subject to a 10-year enhancement, applicable to other violent felonies when the crime is committed for the benefit of a criminal street gang, under section 186.22, subd. (b)(1)(C), but, he is subject to the 15-year minimum eligible parole date under section 186.22, subd. (b)(5), even though it does not add to the minimum eligible parole date of 25 years. It is a factor that can be considered for parole eligibility.
7. *People v. Bautista* (2005) 125 Cal.App.4th 646, the Fifth Appellate District held that a defendant is entitled to have a jury determine under federal law (*People v. Taylor* (2004) 118 Cal.App.4th 11, 23-24, based on *Apprendi*) whether his current offense is a conduct-based serious felony under section 1192.7. Here, there are two ways in which could have been found, either the defendant personally used a firearm under section 1192.7, subd. (c)(8), or that the felony offense constituted a felony violation of section 186.22. The jury was not given the question of personal use; therefore, the finding could not be made on that basis. However, the jury did find that the offense constituted an offense for the benefit of a street gang. Appellant argued that *People v. Briceno* (2004) 34 Cal.4th 451, applies only where the question is whether a prior conviction was for a serious felony and not where the question pertains to the current offense. However, the Court of Appeal applied the argument advanced by the prosecution and found that since the defendant did commit an offense under the circumstances specified in section 186.22, subd. (b)(1), it is tantamount to a finding that the offense was a serious felony. Therefore, the court could impose one

five-year serious felony enhancement. But, it could not impose a second 5-year enhancement under section 186.22, subd. (b)(1)(B), as that would be bootstrapping, which is prohibited by *Briceno, supra*.

8. *People v Flores* (2005) 129 Cal.App.4th 174, the Fourth Appellate District, Division 3 held that the section 186.22, subd. (a) is a necessarily lesser included offense of carrying a firearm while an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C)), and since one cannot be convicted of the lesser included offense, (see *People v. Ortega* (1998) 19 Cal.4th 686, 692), the conviction of section 186.22, subd. (a) must be stricken. Separate punishments for murder and for conspiracy to batter a separate victim, wherein the murder occurred during the course of the conspiracy, do not violate section 654's ban on multiple punishments for the same crime, since the murder was not part of the conspiracy. (See *In re Cruz* (1966) 64 Cal.2d 178, 181 [if the conspiracy had an objective apart from an offense for which the defendant is punished, he may be properly sentenced for the conspiracy as well].) The enhancement under section 12031, subd. 3 and a separate sentence for carrying a gun in the carrying a firearm while an active participant in a criminal street gang did not violate section 654 where the evidence established that the crime for which the enhancement was imposed and the gun possession offense involved separate conduct and separate intents. The court acknowledged that there is a split of authority as to whether section 654 applies to enhancements (see *People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519 [does not apply]; *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817-818; *People v. Arndt* (1999) 76 Cal.App.4th 387 [§ 654 does apply to enhancements that go to the nature of the offense and not to the status of the offender]; see also *People v. Akins* (1997) 56 Cal.App.4th 331; *People v. Palacios* (2005) 126 Cal.App.4th 859, [§ 654 does apply to enhancements), but, determined that on these facts, that it did not.
9. *People v. Martinez* (2005) 132 Cal.App.4th 531, the Fifth Appellate District held that section 654 bans multiple punishments for same crime bars the trial court from imposing a serious felony enhancement and gang enhancement based on the same act or conduct used to support the serious felony enhancement if the underlying crime is a serious felony only because it was committed

for the benefit of a criminal street gang (see *People v. Briceno* (2004) 34 Cal.4th 451; *People v. Bautista* (2005) 125 Cal.App.4th 646), but, it does not bar separate punishments if the underlying offense would have been a serious felony even if it had not been committed for the benefit of the gang. The Court of Appeal finds that under *People v. Coronado* (1995) 12 Cal.4th 145, 157 [section 654 does not apply to prior conviction enhancements], both can be imposed. However, they acknowledge, but, do not discuss the fact that the new Supreme Court ruling in *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7, appears to contract this holding.

10. *People v. Maldonado* (2005) 134 Cal.App.4th 627, the Second Appellate District, Division 4 held that an assault with a firearm is a predicate offense for purposes of the gang enhancement within the meaning of section 186.22, subd. (e)1), which imposes additional punishment when a crime is committed for the benefit of a criminal street gang and defines as a criminal street gang an organization whose members have committed two predicate offenses. Even though section 245, subd. (a)(2) is not listed in the crimes that are classified as predicate offenses, it is a more specific form of assault that was contemplated by the legislature.
11. *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, the Ninth Circuit Court of Appeal established that the prosecution's gang expert testified that the defendant's gang was "turf-oriented," however, he did not testify to a definition of "turf-oriented," what implications arose from a gang being "turf-oriented," or how the gang's "turf-oriented" nature could support the conclusion that robbery of which defendant was convicted, was committed with the specific intent to promote, further, or assist other gang-related criminal activity. Therefore, the Ninth Circuit held that it was unreasonable for the state appellate court to conclude that a rational jury could find that the defendant committed the robbery with the specific intent to facilitate other gang crimes. (See *People v. Augborne* (2002) 104 Cal.App.4th 362, 372 [re: specific intent to further a gang purpose].)
12. *People v. Romero* (2006) 140 Cal.App.4th 15, the Second Appellate District, Division 4, held that the specific intent element of section 186.22, subd. (b)(1), does not require an intent to further the criminal conduct beyond the presently charged crime. Where the defendant

was charged with murder and attempted murder, and the evidence showed he intended to shoot people, intended to help another shoot people, and the other person was a fellow gang member, the specific intent requirement was satisfied. The Court of Appeal refused to follow *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 which found that a showing of intent to promote the gang's criminal activity beyond the charged crime, was needed.

13. *People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, the First Appellate District, Division 4 held that pursuant to section 12025, subd. (b)(3), and section 12031, subd. (a)(2)(C) [street gang firearm possession statutes], which make firearm possession a felony where perpetrator is active participant in street gang, within the meaning of section 186.22, do not require proof that the charged firearm possession was connected with underlying gang participation.
14. *People v. Hill* (2006) 142 Cal.App.4th 770, the Third Appellate District, similar to the Second Appellate District in *People v. Romero* (2006) 140 Cal.App.4th 15, held that section 186.22, subd. (b) does not require that the defendant's intent to enable, or, promote criminal endeavors by other gang members must relate to criminal activity apart from the offense the defendant commits. This court as did the *Romero* court, refused to follow *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099 which found that a showing of intent to promote the gang's criminal activity beyond the charged crime, is needed.
15. *People v. Lamas* (2007) 42 Cal.4th 516, the California Supreme Court held that in order to establish that the defendant actively participated in a criminal street gang within the meaning of the substantive section 186.22, subd. (a), for purpose of elevating the offense of carrying a loaded firearm in public under section 12031 from a misdemeanor to a felony, the prosecution must prove that, (1) the defendant is more than a nominal member of a criminal street gang; (2) that he had knowledge that gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) that the defendant willfully promoted, furthered, or assisted in felonious criminal conduct by members of the gang distinct from the defendant's otherwise misdemeanor conduct of carrying a loaded weapon in public. The elements of section 186.22, subd. (a) have been delineated in *People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

16. *Lopez v. Superior Court* (2008) 160 Cal.App.4th 824, the Fourth Appellate District, Division 3 held, on remand from the California Supreme Court, where the defendant was engaged in gang-related behavior in violation of criminal contempt order was charged with a misdemeanor, the prosecution's use of same underlying facts to impose felony gang enhancement under section 186.22, subd. (d), was impermissible bootstrapping and constituted double punishment. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439.)
17. *People v. Bragg* (2008) 161 Cal.App.4th 1385, the Third Appellate District held that the court's erroneous instruction that battery with serious bodily injury was a predicate offense for a finding that group to which defendant belonged was a criminal street gang was harmless beyond a reasonable doubt where offense of which defendant was convicted in the present case was a predicate offense, and there was undisputed evidence that a fellow gang member had been convicted of another predicate offense. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 320-324.)
18. *People v. Margarejo* (2008) 162 Cal.App.4th 102, the Second Appellate District, Division 7 held that the prosecution's expert witness (police officer) testified that the primary activities of the defendant's gang engaged in were committing crimes, substantial evidence supported the jury's finding that the gang met the criteria of a "criminal street gang," within the meaning of section 186.22. Where the defendant repeatedly made gang hand signs to pedestrians and police during a high speed pursuit, substantial evidence supported the jury's application of the gang enhancement to the violation of section 2800.2 (evading). Where the defendant illegally possessed a gun and then transferred the weapon to a fellow gang member, substantial evidence supported the jury's application of the gang enhancement for illegally possessing a weapon.
19. *People v. Albillar* **REVIEW GRANTED** (S163905) formerly at: (2008) 162 Cal.App.4th 935, the Second Appellate District, Division 6, held that the court's denial of defendants' motion to sever gang charge and bifurcate gang enhancements was not an abuse of its discretion because defendants failed to show prejudice (see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048), where evidence of crimes

would be cross-admissible in separate trials and one charge was not significantly more likely to inflame jury than other charge, and where benefits to state of joinder were significant; joinder did not result in gross unfairness where jury presumably followed instruction limiting purpose of gang evidence. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1316; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) Admission of gang evidence did not violate defendants' right to due process where it was relevant to explain why victim had delayed reporting crimes and to prove acting-in-concert allegations, and substantial evidence supported jury's determination that crimes were committed with specific intent to promote, further, or assist in criminal conduct by gang members. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162 [did the defendant show gross unfairness to establish a denial of due process].) **THE COURT LIMITED REVIEW TO THE FOLLOWING:** Did substantial evidence support defendants' convictions under Penal Code section 186.22, subdivision (a), and the true findings with respect to the enhancements under Penal Code section 186.22, subdivision (b)?

20. *In re Damien V.* (2008) 163 Cal.App.4th 16, the Fourth Appellate District, Division 3 held that section 186.22, subdivision (d)'s alternate penalty provision for an underlying offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang addresses criminal convictions, is applicable to juveniles because the voters' intent in passing Proposition 21, which enacted section 186.22, was to increase the punishment for all gang-related crimes.
21. *People v. Fiu* (2008) 165 Cal.App.4th 360, the First Appellate District, Division 4, held that where the defendant was convicted of second degree murder, the trial court properly sentenced him to a term of 15 years to life, doubled to 30 years to life due to his prior "strike," but erred in adding a 10-year gang participation enhancement. Where a life term is imposed for a gang-related offense, there is a mandatory minimum of 15 years that must be served without possibility of parole, but the 10-year enhancement is not applicable as it only applies when it is added to a determinate term. (See § 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

22. *People v. Ulloa* (2009) 175 Cal.App.4th 405, the Second Appellate District, Division 4 held that, section 1192.7, subdivision (c)(28), defining a “serious felony,” does not include a misdemeanor punishable as a felony pursuant to the alternate penalty provision of section 186.22, subdivision (d). (See *People v. Briceno* (2004) 34 Cal.4th 451; see also *People v. Arroyas* (2002) 96 Cal.App.4th 1439 [does not permit impermissible bootstrapping].) Therefore, the prior to which this relates, cannot be imposed as a felony, since the underlying offense was a misdemeanor, and even if sentenced as a felony within the provisions of section 186.22 subdivision (d), it does not transform the prior into a felony for sentencing purposes in the current case. The supreme court declined to decide this issue in *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907, fn. 17.
23. *People v. Rodriguez* (2009) 47 Cal.4th 501, the California Supreme Court held that where the defendant was convicted of three counts of assault with a firearm, under section 245, the trial court erred in imposing two different sentence enhancements for the defendant’s firearm use, based on (1) his personal use of a firearm (§ 12022.5, subd. (a)) and (2) his commission of a violent felony, as defined by personal use of a firearm to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). Section 1170.1, subdivision (f), provides that “[w]hen two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements” can be imposed. Subdivision (f) precludes the imposition of added prison terms under both of the enhancement provisions at issue in this case, sections 12022.5, subdivision (a), and 186.22, subdivision (b)(1)(C). The court specifically declined to decide whether section 654 applies to sentence enhancements that are based on the nature of the offense.
24. *People v. Jones* (2009) 47 Cal.4th 566, the California Supreme Court held that where the defendant committed a felony specified in section 186.22, subdivision (b)(4) [§ 246], for which he was subject to life imprisonment, because of subdivision (a)(17), of section 12022.53, it triggered the application of the 20-year enhancement under section 12022.53, subdivision (c). The defendant was subject to that 20-year enhancement not because he committed a gang-related offense, but because he committed a particularly

heinous crime (§ 246) punishable by life imprisonment based on the application of section 186.22, subdivision (b)(4).

25. *People v. Brookfield* (2009) 47 Cal.4th 583, the California Supreme Court held that the defendant who was convicted of a gang-related crime under section 186.22, in the commission of which he did not personally use or discharge a firearm, but his companion did, was subject to life imprisonment pursuant to section 186.22, subdivision (b)(4)(B), but the trial court erred by also sentencing him to an additional 10-year enhancement for personal use of a firearm under section 12022.53, subdivisions (b), (e)(1).
26. *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, the Second Appellate District, Division 8 held that the imposition of the 25 to life enhancement pursuant to sections 12022.53, subdivisions (d) and (e)(1), based on finding that a principal fired a gun causing great bodily injury in a crime committed for the benefit of a street gang, is imposed, but it precludes the imposition of 15-year minimum eligible parole date for the gang-related crimes under section 186.22, subdivision (b)(5). (See *People v. Brookfield* (2009) 47 Cal.4th 583.) A defendant who personally uses or discharges a firearm in the commission of a gang-related offense is subject to both the increased punishment provided in section 186.22 and the increased punishment in section 12022.53. Therefore, this defendant, the aider and abetter, is sentenced under the provision of section 3046 for each of the defendant's life sentences, not the 15 year minimum eligibility parole period under section 186.22, but the 25 to life sentence under section 12022.53, subdivision (e)(1), is also imposed.
27. *People v. Sok* (2010) 181 Cal.App.4th 88, the Second Appellate District, Division 7 held that where the defendant received a determinate sentence, plus a 25-year-to-life enhancement pursuant to section 12022.53, subdivision (d) for the use of the gun, and the crime was committed for the benefit of a criminal street gang (§ 186.22), the crime was not "punishable by imprisonment in the state prison for life" as the phrase is used in section 186.22, and as a result, the trial court correctly imposed the 10-year enhancement under section 186.22, subdivision (b)(1)(C), rather than a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5). (See *People v. Montes* (2003) 31 Cal.4th 350, 352-353,

362.) Where the defendant was convicted of shooting at an occupied vehicle (§ 246), with special findings that the crime was committed for the benefit of a criminal street gang, that the defendant discharged a firearm causing great bodily injury, and that the defendant had a prior strike, the trial court erred in imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), and should instead have imposed alternate minimum sentence of 15 to life under section 186.22, subdivision (b)(4).

28. *People v. Duarte* (2010) 185 Cal.App.4th 194, the Fourth Appellate District, Division 3 held that the trial court erred by failing to stay, pursuant to section 654, the defendant's sentence on section 186.22, subdivision (a), because the defendant had the same intent and objective in the count for discharging a firearm with gross negligence, pursuant to section 246.3, subdivision (a). (See *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297 [if all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective the defendant may be found to have a single intent, and may be punished only once].) Where the underlying felony is a necessary element of the street terrorism charge, section 654 bars separate punishment. (See *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1314.) Here, appellant fired one shot and three offenses were charged from that one incident.
29. *People v. Mesa* (2010) 186 Cal.App.4th 773, the Fourth Appellate District, Division 1, answered various sentencing questions posed by the defendant, who did not raise sufficiency issues. The defendant was convicted of two counts of assault after two separate incidents in which he shot and severely wounded two complete strangers, and jury also found true great bodily injury and personal firearm allegations with respect to both convictions. The trial court erred, by imposing multiple gang enhancements, and a firearm use enhancement (§ 12022.5, subd. (a)), pursuant to section 1170.1, subdivisions (f), which prevented the trial court from imposing the gang enhancement on one of the convictions along with the firearm enhancement since both involved being armed with or the use of a dangerous or deadly weapon. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 509.) The matter was remanded for resentencing on the issue for the court to restructure the sentence. Under section

654, a felon's continuous possession of a single firearm does not permit multiple punishments for violations of section 12021, subdivision (a), that prohibits felons from possessing a firearm where the record showed that the defendant had continuous possession of the firearm. (See *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) This court sided with *People v. Herrera* (1999) 70 Cal.App.4th 1456, and *People v. Ferraez* (2003) 112 Cal.App.4th 925, and finds that section 654 did not prevent separate punishments for assault and for participation in a criminal street gang (§ 186.22, subd. (a)), because the criminal street gang statute punishes conduct and intentions that are separate from the conduct and intentions that give rise to culpability for assault with a firearm. The Court of Appeal acknowledges that *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310-1313, and *People v. Vu* (2006) 143 Cal.App.4th 1009, precludes sentencing the defendant for both the substantive offense of gang participation and for the underlying crime.

30. *People v. Rodriguez* (2010) 188 Cal.App.4th 722, the Third Appellate District held that a defendant's knowing and active participation in gang activities is insufficient for a conviction under section 186.22, subdivision (a), the substantive criminal street gang offense. (See *People v. Lemas* (2007) 42 Cal.4th 516, 523.) Here, the defendant committed an attempted robbery by himself. Said section requires more than one participant in the felonious criminal conduct to support the gang crime instead of the gang enhancement. (See *People v. Castenada* (2000) 23 Cal.4th 743.) This court believes that *People v. Salcido* (2007) 149 Cal.App.4th 356, and *People v. Ngoun* (2001) 88 Cal.App.4th 432, and *People v. Sanchez* (2009) 179 Cal.App.4th 1297 have strayed from the dictates of *Castenada*.

D. GREAT BODILY INJURY ENHANCEMENT UNDER SECTION 12022.7, SUBDIVISION (D) IS NOT MORE SPECIFIC THAN 12022.95, AND EITHER CAN BE PLED

1. *People v. Corban* (2006) 138 Cal.App.4th 1111, the First Appellate District, Division 1 held that where child endangerment (§ 273a, subd. (a)), results in death, the prosecution may seek enhancement of the sentence under either section 12022.7, subd. (d), or section 12022.95, as neither enhancement is more specific than the other.

E. GROUP BEATING CAN LEAD TO A FINDING OF A SERIOUS FELONY WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8)

1. *People v. Modiri* (2006) 39 Cal.4th 481, the California Supreme Court held that CALJIC 17.20, the standard instruction on the enhancement for infliction of great bodily injury, permitting jury to find special allegation to be true if it concludes defendant participated in a “group beating” with intent to cause great bodily injury. Where the defendant instigated a fight with the victim that escalated into a chaotic group beating of the victim, but, no determination could be made whether the defendant’s blows were the ones that caused the victim’s injuries, the court did not err in instructing jury that it could find, for purposes of punishment in a future prosecution, that defendant “personally inflict[ed] great bodily injury” on victim thereby committing a serious felony within meaning of section 1192.7, subd. (c)(8), if the jury found that the defendant personally applied physical force to victim under such circumstances in which he knew other participants in incident were applying similar force, and knew or reasonably should have known that cumulative effect of force used by all participants would result in great bodily injury to victim. Therefore, it was not error for the jury to find that the defendant personally inflicted great bodily injury in the commission of felony pursuant to section 1192.7, subd. (c)(8).

F. HEALTH AND SAFETY CODE SECTION 11353.6 WITHIN SCHOOL ZONE

1. *People v. Davis* (2006) 141 Cal.App.4th 519, the Second Appellate District, Division 6, held that there was insufficient evidence that the defendant was in violation of Health and Safety Code section 11353.6, as the garage of a private residence that was not accessible to the general public and was not a public area within the meaning of said section. (See *People v. Jimenez* (1995) 33 Cal.App.4th 54, 60; *People v. Townsend* (1998) 62 Cal.App.4th 1390, 1395-1397; *People v. Todd* (1994) 30 Cal.App.4th 1724, 1729 [the enhancement does not apply to drug transactions that take place solely within the confines of a private residence].)

G. SERIOUS FELONIES UNDER SECTION 667, SUBDIVISION (a)(1)

1. *People v. Ringo* (2005) 134 Cal.App.4th 870, the Second Appellate District, Division 5, held that a pre-Proposition 21 conviction for making a criminal threat is a serious felony within the meaning of section 667, subd. (a)(1). Appellant argued that the change in the lock-in date only affected the three-strikes law, and not section 667, subd. (a)(1). However, the court rejected that argument, indicating that the lock-in date of June 30, 1993, within section 667, subd. (h), applies only to the three-strikes law and not section 667, subd. (a)(1).
2. *People v. Warner* (2006) 39 Cal.4th 548, the California Supreme Court held that were the defendant was convicted a violation of section 288, subd. (a) (lewd or lascivious conduct with a child under 14 years of age), and found that he had suffered prior felony conviction in Nebraska for child sexual assault, but, did not find that he had acted with specific lewd intent in the Nebraska crime as no facts to that offense were presented by the prosecution. The court erred in imposing the serious felony enhancement under 667, subd. (a), and for a strike, where the Nebraska crime, which required intentional touching that could be “reasonably construed as being for the purpose of sexual arousal or gratification” did not contain the “specific intent of arousing” element of California’s definition of that felony. The court distinguished *People v. Murphy* (2001) 25 Cal.4th 136, as nothing in Murphy supports the proposition that conduct or behavior not amounting to a felony if committed in this

state could nevertheless qualify as a serious felony under section 1192.7, subd. (c).

3. *People v. Jackson* DEPUBLISHED (2009) 170 Cal.App.4th 1600, the Third Appellate District held that section 667, subdivision (a)'s predicate requirement that charges must have been "brought and tried separately" for a five-year enhancement to apply to convictions from those charges, restricts number of five-year terms to be served (*In re Harris* (1989) 49 Cal.3d 131, 136), rather than the number of allegations the trial court may find to be true. Where the defendant was convicted of five prior serious felonies, only one of which was brought and tried separately, the trial court had to impose and then execute a five-year enhancement for one conviction, then impose and stay remaining enhancements.

H. PRISON PRIOR ENHANCEMENTS 667.5, SUBDIVISION (b)

1. *People v. Langston* (2004) 33 Cal.4th 1237, the California Supreme Court held that a prison term for escape is "separately served" and can be the basis for a one-year enhancement on a subsequent felony conviction within the meaning of section 667.5, subd.s (b) and (g). The High Court affirmed the lower court's opinion in *People v. Carr* (1988) 204 Cal.App.3d 774, 780-781, pertaining to the dichotomy between section 1170.1, subd. (c) and section 667.5, subd. (g). The Supreme Court overruled the opinion in *People v. Kelly* (1983) 33 Cal.3d 267, to the extent that it is inconsistent with this opinion.
2. *People v. Fielder* (2004) 114 Cal.App.4th 1221, the Second Appellate District, Division 4, held, following a rehearing, that in order for prosecution to avoid application of the 5-year "washout" provision for a one-year prior prison term within the meaning of section 667.5, subd. (b), the prosecution must prove beyond a reasonable doubt that the defendant either committed a new offense resulting in a felony conviction or was in prison custody during that period. The Court of Appeal also found that even though a CRC commitment is not a prior prison term, the conviction of the offense which sent appellant to CRC is a conviction that prevents the washout period from taking effect. However, given the fact that the documents presented to the court did not establish when the 1993 conviction, which led to one of the CRC commitments, was

“committed,” the evidence was insufficient to establish that there was not a 5 year period leading up to the 1997 conviction when appellant was state prison free and felony conviction free. Therefore, the matter was remanded to the superior court to determine if the prior will be retried.

3. *People v. Johnson* (2006) 145 Cal.App.4th 895, the First Appellate District, Division 5 held that the court erred in imposing prior-prison-term enhancement within the meaning of section 667.5, subd. (b), where the defendant had not completed that term at time of trial. (See *People v. Jones* (1998) 63 Cal.App.4th 744, 746-747.)
4. *People v. McFearson* **REVIEW GRANTED THEN TRANSFERRED TO FIFTH DISTRICT (SEE INFRA)**
FORMERLY AT: (2008) 158 Cal.App.4th 810, the Fifth Appellate District held that the court erred in using the defendant’s prior convictions to impose an aggravated sentence and to impose one-year prior prison term enhancements pursuant to the terms of section 667.5, subd. (b). The court found that the prior prison term is merely a subset of a prior conviction, and therefore violated *People v. Prather* (1990) 50 Cal.3d 428, and *People v. Jones* (1993) 5 Cal.4th 1142 [cannot impose a § 667 enhancement for the same prior as the § 667.5, subd. (b)].)
5. *People v. Garcia* (2008) 167 Cal.App.4th 1550, the Second Appellate District, Division 5 held that, where the court imposed indeterminate sentences, based on multiple offenses, some being serious felonies, and priors that made him eligible for a three strike sentence, and the fact that the jury also found that he had served five prior prison terms, and personally used a firearm in commission of all offenses, except a firearm possession by felon, the court was required to exercise its discretion and either impose one-year prior prison term enhancements pursuant to section 667.5, subdivision (b), on every appropriate count, depending on whether each offense was a “serious felony,” (see *People v. Williams* (2004) 34 Cal.4th 401-405; *People v. Misa* (2006) 140 Cal.App.4th 837, 845-846), or strike the enhancements pursuant to section 1385, subdivision (a). (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396; see also *People v. McCray* (2006) 144 Cal.App.4th 258, 267.)

6. *People v. McFearson* (2008) 168 Cal.App.4th 388, the Fifth Appellate District held that the trial court erred when it used defendant's prior convictions to impose an aggravated sentence and then used the same convictions wherein appellant was sentenced to state prison, as prior prison terms to enhance defendant's sentence by those 3 additional years. (See *People v. Prather* (1990) 50 Cal.3d 428 and *People v. Jones* (1993) 5 Cal.4th 1142 pertaining to an improper dual use.) The matter was remanded back to the trial court to determine if the aggravated sentence should be given and or if the court wanted to impose any or all of the prior prison term enhancements.
7. *People v. Conerly* (2009) 176 Cal.App.4th 240, the First Appellate District, Division 3 held that the court must order joint trial and the severance is the exception].) the trial court must strike or impose a prior prison term enhancement (§ 667.5, subd. (b).) The Court of Appeal can strike the 1-year enhancement when the trial court's intention is clear that it did not want them imposed, and order the superior court to correct the abstract of judgment since an unauthorized sentence can be corrected at any time. (*People v. Langston* (2004) 33 Cal.4th 1237, 1231.)
8. *In re Preston* (2009) 176 Cal.App.4th 1109, the First Appellate District, Division 3 held that the defendant's request for habeas corpus relief premised solely on arguments that his confinement was in excess of the maximum allowed by law presented cognizable claims for appellate court consideration. Whether a parolee has remained free of prison custody for purposes of section 667.5, subdivision (b), depends on whether he has remained on parole without revocation or has been discharged from custody for a continuous five-year period. (See also *In re Panos* (1981) 125 Cal.App.3d 1038, 1042.)

I. STAY THE SHORTER SENTENCE, INCLUDING ENHANCEMENTS

1. *People v. Manila* (2006) 139 Cal.App.4th 589, the Fifth Appellate District held that section 654's prohibition against multiple punishments for a single crime applies to sentences imposed under enhancement statutes where the enhancement is based on conduct in which the defendant engaged in committing the crime (§ 12022, subd. (c)), including arming enhancements. (See *People v. Coronado* (1995) 12 Cal.4th 145.) However, section 654 does not apply to status enhancements such as those based on prior convictions. Where the defendant was convicted of Health and Safety Code section 11351.5 and of being a felon in possession of a firearm (sec. 12021, subd. (a)), and the allegation of being armed during the possession of the drug offense was found true based on same evidence, enhancement had to be stayed.

J. SECTION 12022, SUBDIVISION (b)

1. *People v. Blake* (2004) 117 Cal.App.4th 543, the Second Appellate District, Division 7, held that, on the fact of this case, caustic chemicals, such as pepper spray and mace, when used to facilitate or threaten a robbery, constitute “dangerous or deadly” weapons for which an enhanced sentence within the meaning of section 12022, subd. (b) may be imposed.
2. *People v. Crites* (2006) 135 Cal.App.4th 1251, the Second Appellate District, Division 6 held that where two special allegations within the meaning of section 12022, subd. (b) (knife and steel-toed shoe) that defendant used a deadly or dangerous weapon during commission of a violent felony were found true, the trial court properly imposed the first enhancement and stayed the second. (See *People v. Jones* (2000) 82 Cal.App.4th 485, 492-493.) The second enhancement was authorized by law, therefore the court was not required to strike it, and could validly stay it.
3. *People v. Burton* (2006) 143 Cal.App.4th 447, the Third Appellate District held that there the evidence was sufficient to support a finding that a dangerous or deadly weapon was used within the meaning of section 12022, subd. (b)(1) as there are two classes of dangerous or deadly weapons, (1) weapons such as guns and blackjacks, and (2) instrumentalities which may be used as a weapon, but, which have nondangerous uses as well. A jury can

infer the use of a dangerous or deadly weapon from the victim's injuries. (*People v. Alvarez* (1996) 14 Cal.4th 155, 179.) Here, the defendant's use of gloves was sufficient to support the enhancement.

4. *People v. Smith* (2007) 150 Cal.App.4th 89, the Second Appellate District, Division 4 held that it was not error to impose a deadly weapon use enhancement pursuant to section 12022, subd. (b)(1), where the defendant used a knife to kill a dog and was convicted of animal cruelty within the meaning of section 597, subd. (a)(2). The statute does not limit enhancement's application to attacks on human beings, and use of a knife or other deadly weapon is not an element of the crime of animal cruelty, since in the abstract (see *People v. Hansen* (1994) 9 Cal.4th 300, 317), the death of the animal can be caused without the use of a deadly weapon at all.
5. *People v. Jones* (2007) 157 Cal.App.4th 1373, the Second Appellate District, Division 7 held that the court's discretion to strike a sentence enhancement, pursuant to section 1385, includes discretion to striking a deadly weapon enhancement under section 12022, subd. (b)(1). The rationale is similar to that used by the Supreme Court in *People v. Meloney* (2003) 30 Cal.4th 1145, 1156.) As a result of the court "uniformed discretion," it must be remanded for resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Meloney, supra*, 30 Cal.4th at p. 1165.)

K. SECTION 12022, SUBDIVISION (c)

1. *People v. Delgadillo* (2005) 132 Cal.App.4th 1570, the Fourth Appellant District, Division 2, held that evidence that the defendant stored firearms in his bedroom along with a significant sum of money and in close proximity to cars in which defendant and his colleagues stored lab equipment and raw material for the manufacture of methamphetamine, established, pursuant to the majority of the court, following *People v. Bland* (1995) 10 Cal.4th 991, 999, that the firearms were available to the defendant for use during the manufacturing process, and thus supported the personal use allegation within the meaning of section 12022, subd. (c) enhancement for being personally armed with a firearm during the commission of the crime of manufacturing methamphetamine, even though defendant was not in possession of the guns when he was detained, and there was no evidence he was ever armed while at methamphetamine lab. The dissent does not believe that *Bland* should support this enhancement.
2. *People v. Pitto* (2008) 43 Cal.4th 228, the California Supreme Court held that a defendant who was within arm's reach of both a gun and a saleable amount of methamphetamine in his vehicle when he encountered police, and admittedly knew of gun's presence and admitted purposefully placing it there, and no dispute existed that firearm, because of its location, was available for offensive or defensive use in committing underlying drug crime (see *People v. Bland* (1995) 10 Cal.4th 991), the court did not err in determining that the defendant was "armed" with a gun "in the commission" of offenses under section 12022, subdivision (c), and imposing a sentence enhancement. Additionally, the defendant was not entitled to a sua sponte instruction highlighting evidence that he placed gun in a position near the drugs for a reason unrelated to drug crimes because his deliberate placement of the weapon negated any claim that proximity of gun and drugs was result of mere accident or coincidence.

L. SECTION 12022.5 USE V. ARMED

1. *Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, the Second Appellate District, Division 7 held that the preliminary hearing court erred in finding that there was sufficient evidence to support a “use” enhancement with the meaning of section 12022.5, subd. (a). The evidence established that the defendant, who was charged with burglary, was armed, and the only action the defendant demonstrated with the gun was to place his hand on it. The gun was not pointed at the victim at any time. The defendant was merely armed in this instance. (See *People v. Reaves* (1974) 42 Cal.App.3d 852, 856-857; *People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, 1472.) Given the fact that the defendant committed no “action” with the gun, or there was no gun related “conduct,” this is a situation of being armed rather than the use of the weapon.
2. *People v. Wardell* (2008) 162 Cal.App.4th 1484, the Sixth Appellate District held that an enhancement within the meaning of section 12022.5, subdivision (a), does not require specific intent, and nothing in the statute indicates that the gun has to be pointed at the victim when it is otherwise displayed and seen by the victim. (*People v. Granado* (1996) 49 Cal.App.4th 317, 322; see also *Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1002 [there are no particular fact patterns to show the defendant has “used” the gun for enhancement purposes].)

M. SECTION 12022.53

1. *People v. Flores* (2005) 129 Cal.App.4th 174, the Fourth Appellate District, Division 3 held that the court erred in omitting from CALJIC 17.19.5, where the defendant was charged with murder of an accomplice, that the section 12022.53, subd. (d) enhancement, does not apply if the victim was the defendant’s accomplice. While one cannot be an accomplice to one’s own murder, the section 12022.53, subd. (d) enhancement does not apply if the defendant is convicted under the doctrine of transferred intent and the decedent was an accomplice to the target crime.
2. *People v. White* (2005) 133 Cal.App.4th 473, the Second Appellate District, Division 4, held that an enhancement within the meaning of

section 12022.53, which is attached to a subordinate count, is imposed as one-third the middle term of the enhancement; therefore, 3 years, 4 months, and it is not imposed full term.

3. *People v. Hernandez* (2005) 134 Cal.App.4th 474, the Second Appellate District, Division 7 held that section 12022.53, which imposes a 25-year-to-life enhancement when a defendant is convicted of a murder committed for the benefit of a criminal street gang and any principal fired the fatal shot (§ 12022.53, subd. (e)(1), and where enhancement is imposed upon the defendant convicted of a murder not committed for the benefit of a criminal street gang only if the defendant personally did the shooting (§ 12022.53, subd. (d)), does not deny the defendant the right of equal protection or due process of law to those who aid and abet a gang-related murder in which the perpetrator uses a gun. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12-15.)
4. *People v. Carrasco* (2006) 137 Cal.App.4th 1050, the Second Appellate District, Division 6 held that the defendant personally discharged firearm during the commission of a robbery, even though no gun was displayed when victim gave the defendant the money. (See *People v. Granado* (1996) 49 Cal.App.4th 317, 325.) Finally, the Court of Appeal held, relying on *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713, that the section 12022.53, subd. (b) enhancement, which attached to count 1, should have been stayed and not stricken when the section 12022.53, subd. (c) enhancement is imposed. (See § 12022.53, subd. (f).)
5. *People v. Shabazz* (2006) 38 Cal.4th 55, the California Supreme Court held that the special circumstance set forth in section 190.2, subd. (a)(22), which authorizes imposition of a punishment of death or life imprisonment without the possibility of parole for an active participant of a criminal street gang who “intentionally killed the victim” to further the activities of the gang, applies to a defendant who discharged a firearm with the intent to kill one person, but, missed the intended victim and killed another individual. (See also *People v. Scott* (1996) 14 Cal.4th 544, 551 [a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had the fatal blow reached the person for whom intended].) The

High Court also ruled that a defendant sentenced to life without the possibility of parole for first degree murder is also subject to a sentence enhancement of 25 years to life pursuant to section 12022.53, subd. (d) for personally discharging a firearm and causing death in the commission of the murder. (See § 669.) The Court rejected appellant's argument that section 12022.53, subd. (j) precludes the imposition of that enhancement.

6. *People v. Grandy* (2006) 144 Cal.App.4th 33, the Second Appellate District, division 4, held that where the defendant aimed his gun and pulling its trigger, causing an explosion in its firing chamber, constituted a discharge within the meaning of section 12022.53, subd. (c) even though the gun malfunctioned and did not actually emit a bullet. (See *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1148-1153 [the imposition of section 12022.53, subd. (d) regardless of whether the bullet caused injury; the firing of the gun alone, caused the victim to break his ankle].)
7. *People v. Smart* (2006) 145 Cal.App.4th 1216, the Third Appellate District held that the court erred in imposing two separate 25-L enhancements within the meaning of section 12022.53, subd. (d), when the prosecution only charged one offense (section 246, shooting into an occupied vehicle) that qualified for the enhancement even though there were two victims involved in the incident. Section 12022.53, subd. (f), which provides that only one additional term of imprisonment under that section can be imposed on a defendant for "each crime." (See *People v. Oates* (2004) 32 Cal.4th 1048, 1057 [only one enhancement per crime].) In other words, the enhancement does not define the crime, it just adds an additional penalty for the crime committed. (*People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.)
8. *People v. Warner* (2007) 155 Cal.App.4th 57, the Fifth Appellate District held that where the jury finds true multiple special allegations related to the use of a firearm, the lesser enhancement, here section 12022.5, subd. (a), must be stricken rather than stayed. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704.) NOW SEE *People v. Gonzalez* (2008) 43 Cal.4th 1118, AND *People v. Warner* (2008) 166 Cal.App.4th 653, BELOW.

9. *People v. Sun* (2007) 157 Cal.App.4th 277, the Second Appellate District, Division 4 held that where the defendant was subject to enhancements under both sections 12022.53, subds. (b)-(d) and 12022.7, subd. (e), the latter enhancement should have been stricken, rather than merely stayed, but the subd. (b) and (c) enhancements should be stayed and not stricken. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704.) The court points out the discrepancy between section 12022.53, subd. (f) and subd. (h), the first indicating only one enhancement is to be imposed, and the later indicating that the court shall not strike an allegation under this section. (See *People v. Gonzalez* (2008), *infra*.)
10. *People v. Zarazua* (2008) 162 Cal.App.4th 1348, the Third Appellate District held that the shot which was fired, even though it did not hit the victim, but did cause a car crash, which was the proximate cause of the accident and death of the minor victim, was sufficient evidence to support the true finding on the 25 to life enhancement within the meaning of section 12022.53, subdivision (d). (See *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1148-1150.)
11. *People v. Gonzalez* (2008) 43 Cal.4th 1118, the California Supreme Court held that section 12022.53 requires that, after a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed. The court specifically disapproved of *People v. Bracamonte* (2003) 106 Cal.App.4th 704, which held that the lesser enhancements were to be stricken.
12. *People v. Monjaras* (2008) 164 Cal.App.4th 1432, the Third Appellate District held that where a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within meaning of firearm use enhancement within the meaning of section 12022.53(b). (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11-12; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541 [an object can be established by direct or circumstantial evidence].) The victim's inability to say conclusively that gun was

real and not a toy does not create a reasonable doubt, as a matter of law, that gun was a firearm. (See *People v. Rodriguez*, *supra*, 20 Cal.4th at 13; *People v. Lochtefeld*, *supra*, 77 Cal.App.4th at 541.)

13. *People v. Warner* (2008) 166 Cal.App.4th 653, the Fifth Appellate District held that where a violation of section 12022.53, subdivision (d), and “personal use” firearm enhancement allegations are proven, (see §§ 12022.53, subd. (b), 12022.5, subd. (a)) the personal-use enhancements must be imposed and stayed, not stricken. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123, 1130, fn.8.)
14. *People v. Sinclair* (2008) 166 Cal.App.4th 848, the Second Appellate District, Division 4 held that the phrase “another enhancement” as used in section 12022.53, subdivision (j), which provides that a trial court must impose punishment for a gun use enhancement rather than impose punishment authorized under any other provision of law unless another enhancement provides for a greater penalty or longer term of imprisonment, does not encompass combinations of enhancements. Where appellant was also charged with a gang enhancement in each count pursuant to 186.22, that a principal in each offense had been armed with a firearm, and that principal had personally used a firearm, the trial court was required to impose gun use enhancement, and impose and stay gang enhancement, unless court exercised its discretion to strike gang enhancement. Where the defendant was convicted a section 245, subdivision (a)(2) (assault with the use of a gun), the trial court erred in imposing the armed principal enhancement pursuant to section 12022, subdivision (a)(1). Because assault with a firearm is not listed as a violent felony in section 667.5, subdivision (c) and is encompassed by section 1192.7, subdivisions (c)(23)’s definition of a “serious felony,” the defendant’s conviction for assault with a firearm was only subject to five-year gang enhancement for serious felonies as opposed to 10-year enhancement for violent felonies.
15. *People v. Munoz* (2009) 178 Cal.App.4th 468, the Third District held that the trial court erred when it indicated that it “had to” impose consecutive sentences because two counts pertained to two separate victims, and the incidents occurred at separate times. The court can consider sentencing appellant to either the upper term or consecutive sentences based on multiple victims (*People v. Calhoun* (2007) 40

Cal.4th 398, 408; *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1-61), however, here the incidents were not at separate times. Therefore, the matter must be sent back due to the failure of the court to exercise its discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.) Appellant was convicted of attempted murder in count 2, an indeterminate sentence, and in count 4 with shooting from a motor vehicle, a determinate sentence. If the court, on remand chooses to impose count 4 consecutive to count 2, the enhancement under 12022.53, subdivision (d), found true as to both counts, would be full term consecutive, 25 - life, and not 1/3 the middle term of the enhancement since count 2 is an indeterminate term, and count 4 is determinate, due to the fact that section 1170.1 does not apply in this circumstance.

16. *People v. Frausto* (2009) 180 Cal.App.4th 890, in 2009 Los Angeles Daily Journal 18003, the Second Appellate District, Division 8 held that the phrase "in the commission of" in section 12022.53, subdivision (d) has the same meaning as the identical or equivalent language in sections 667.61, 12022.3, 12022.5 and the felony murder statutes. As a result, a firearm is discharged "in the commission of" a felony within the meaning of section 12022.53, subdivision (d) if the underlying felony and the discharge of the firearm are part of one continuous transaction, which includes flight after the felony until the defendant reaches a place of temporary safety. Additionally, the Court of Appeal found that the defendant's three prior convictions pursuant to section 667, subdivision (a)(1) could not support separate enhancements because they were the result of a single prior proceeding. (*In re Harris* (1989) 49 Cal.3d 131, 136.)
17. *People v. Sok* (2010) 181 Cal.App.4th 88, the Second Appellate District, Division 7 held that where the defendant received a determinate sentence, plus a 25-year-to-life enhancement pursuant to section 12022.53, subdivision (d) for the use of the gun, and the crime was committed for the benefit of a criminal street gang (§ 186.22), the crime was not "punishable by imprisonment in the state prison for life" as the phrase is used in section 186.22, and as a result, the trial court correctly imposed the 10-year enhancement under section 186.22, subdivision (b)(1)(C), rather than a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5). (See *People v. Montes* (2003) 31 Cal.4th 350, 352-353,

362.) Where the defendant was convicted of shooting at an occupied vehicle (§ 246), with special findings that the crime was committed for the benefit of a criminal street gang, that the defendant discharged a firearm causing great bodily injury, and that the defendant had a prior strike, the trial court erred in imposing the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), and should instead have imposed alternate minimum sentence of 15 to life under section 186.22, subdivision (b)(4).

18. *People v. Botello* (2010) 183 Cal.App.4th 1014, the Second Appellate District, Division 4 held that the evidence was insufficient to support the firearm enhancements under section 12022.53, where the defendant had to personally use the weapon, as the witness could not identify which defendant was the shooter. Section 12022.53, subdivision (e)(1) cannot be argued for the first time on appeal to save an imposed firearm enhancement under subdivision (d) or the stayed enhancements under subdivisions (b) and (c) since that statute has a specific pleading and proof requirement. (See *People v. Mancebo* (2002) 27 Cal.4th 735; *People v. Arias* (2010) 182 Cal.App.4th 1009.) Where the information charged the defendants with personally committing acts specified in the sections 12022.53, subdivision (b) through (d), but did not mention the applicability of those enhancements through subdivision (e)(1), either by designation of that provision or by description of the required circumstances, application of subdivision (e)(1) to defendants for the first time on appeal would violate the express pleading requirement of that provision and the defendants' due process right to notice. The harmless error analysis does not apply to the failure to meet the pleading requirement of subdivision (e)(1). The prosecution forfeited its right to rely on that subdivision where it failed to plead subdivision (e)(1), failed to ensure the jury findings under that subdivision, failed to raise the provision at sentencing, and obtained a sentence that in fact violated subdivision (e)(1).
19. *People v. Camino* (2010) 188 Cal.App.4th 1359, the Fourth Appellate District, Division 3 held that as it pertains to appellant's sentence, the Court of Appeal did find insufficient evidence to support the jury's finding that he vicariously discharged a gun, within the meaning of section 12022.53, subdivisions (c), (e)(1) [20 years for the vicarious liability based on the gang participation]), causing

the decedent's death where the decedent was the lone shooter, and the only armed individual in the defendant's group. The decedent could not be the principal in his own murder. (*People v. Antick* (1975) 15 Cal.3d 79, 91; see also *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 845.) The jury was misled by CALCRIM 1402, which applies to the gun/gang enhancement, given the lack of evidentiary support for the gun enhancement.

20. *People v. Yang* (2010) 184 Cal.App.4th 912, the Third Appellate District held that the trial court erred by imposing the gun enhancement under section 12022.53, subdivision (d) and (e)(1) for firearm discharge by a co-principal that caused death in a gang-committed felony on the defendant, who was the aider and abetter to a murder, where the defendant was only convicted of a voluntary manslaughter and participating in a criminal street gang, but acquitted him of murder, attempted murder, and shooting at an occupied car. The enhancement did not apply because the defendant was not convicted of one of the qualifying offenses enumerated by statute. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1174 [the defendant must be convicted of a substantive offense enumerated in the statute]; see also *People v. Smart* (2006) 145 Cal.App.4th 1216, 1226 [an enhancement cannot define the crime, cannot be the tail wagging the dog].) The court then imposed the 186.22, subdivision (b)(1)(C), for the serious felony that it had previously stayed.

N. SECTION 12022.55

1. *People v. Rameriz* (2010) 184 Cal.App.4th 1233, the Second Appellate District, Division 5 held that the court erred in imposing a 5 year enhancement within the meaning of section 12022.55, for intentionally inflicting great bodily injury or death on a person "other than an occupant of a motor vehicle" as a result of discharging a firearm from a motor vehicle in the commission of a felony when the victim is an occupant of a motor vehicle.

O. SECTION 12022.6

1. *People v. Fernandez* (2004) 123 Cal.App.4th 137, the Fourth Appellate District, Division 2, held that movement of the victim's property from its warehouse to the loading dock was a "taking" and caused a "loss" within the meaning of section 12022.6, subd. (a)(2), which provides for an enhanced penalty when the loss caused by a felonious taking of property which exceeds \$150,000.
2. *People v. Frederick* (2006) 142 Cal.App.4th 400, the Second Appellate District, Division 6 held that merely because the court imposed sentence on the co-defendant, and applied section 654 to certain counts, it is not required to do so for appellant when the facts of the case do not support it. There is no reason why the mistake (in sentencing the co-defendant) should be perpetuated and carried into the sentencing of a codefendant. (*People v. Nelson* (1987) 194 Cal.App.3d 77, 80.) Where the offenses are separated by time and involve different victims, section 654 does not have to be applied. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Additionally, the Court of Appeal found that the crime of filing false income tax return is not part of a common scheme or plan to take property within meaning of section 12022.6, subd. (b), under which losses from common scheme may be aggregated for purposes of determining sentence enhancement.

P. SECTION 1192.7, SUBDIVISION (c)(37)

1. *People v. Neely* (2004) 124 Cal.App.4th 1258, the Second Appellate District, Division 5 held that when section 1192.7, subd. (c)(37), "intimidation of victims or witnesses, in violation of Penal Code section 136.1" was added with the passage of Proposition 21, it added to the list of serious felonies all violations of that section, not only those that include "intimidation" or the use of, or threat, to use force as an element.

Q. PENAL CODE SECTION 12022.7, SUBDIVISION (a)

1. *People v. Esquibel* (2006) 143 Cal.App.4th 645, the Second Appellate District, Division 8 held that the court erred in imposing both a 25 to life enhancement pursuant to section 12022.53, subd. (d) and a great bodily injury enhancement within the meaning of section 12022.7, subd. (a).
2. *People v. Sun* (2007) 157 Cal.App.4th 277, the Second Appellate District, Division 4 held that where the defendant was subject to enhancements under both sections 12022.53, subd.s (b)-(d) and 12022.7, subd. (e), the latter enhancement should have been stricken, rather than merely stayed, but the subd. (b) and (c) enhancements should be stayed and not stricken. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704.) The court points out the discrepancy between section 12022.53, subd. (f) and subd. (h), the first indicating only one enhancement is to be imposed, and the later indicating that the court shall not strike an allegation under this section. It is noted that the issue is before the California Supreme Court in *People v. Gonzalez* (S149898).
3. *People v. Cross* (2008) 45 Cal.4th 58, the California Supreme Court held that a surgical abortion, performed on a 13 year old girl, can support an enhancement under section 12022.7 for the defendant's personal infliction of great bodily injury in committing the offense that led to the victim's pregnancy, and that in this instance the pregnancy itself can constitute such great bodily injury. (See *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121, 1131-1132; see also *People v. Sargent* (1978) 86 Cal.App.3d 150.) Where the 13-year-old victim became pregnant by her stepfather and carried the fetus for 22 weeks, the jury could reasonably have found that the victim suffered a significant or substantial physical injury. Where the trial court instructed the jury that "a pregnancy or an abortion may constitute great bodily injury" and did not instruct them on meaning of personal infliction the trial court did not err by failing to instruct on meaning of personal infliction, but the court erred in instructing the jury that an abortion may constitute great bodily injury, even though such statement was legally correct, because the defendant did not personally perform the abortion. Such instruction would not have misled the jury into concluding that the defendant

inflicted great bodily harm by virtue of victim's abortion by facilitating the victim in obtaining the abortion.

4. *People v. Esquibel* (2008) 166 Cal.App.4th 539, the Second Appellate District, Division 8 held that the trial court erred in imposing both a 25-year-to-life enhancement under section 12022.53, subdivision (d) and a great bodily injury enhancement under section 12022.7, subdivision (a), with respect to same victim.
5. *People v. Frazier* (2009) 173 Cal.App.4th 613, the Third Appellate District held that where the defendant was convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), after she directed a dog to attack the victim, there was sufficient evidence to sustain the section 12022.7, subdivision (a) enhancement for "personally" inflicting great bodily injury on the victim.
6. *People v. Valdez* (2010) 189 Cal.App.4th 82, the Fourth Appellate District, Division 3 held that the defendant/driver's failure to stop and render assistance at the scene of an injury accident in violation of Vehicle Code section 20001, subdivision (a) did not support a great bodily injury enhancement under section 12022.7, subdivision (a), because the injuries were caused by acts which occurred prior to the criminal act, not as a result of defendant's flight, and because the defendant/driver was not engaged in the commission of a felony or attempted commission when the collision occurred. (See *People v. Braz* (1998) 65 Cal.App.4th 425, 430-432; *People v. Wood* (2000) 83 Cal.App.4th 862, 864-867.) In a situation where the injury is caused by the defendant's failure to stop and render aid, the great bodily injury enhancement can be applied. (See *Bailey v. Superior Court* (1970) 4 Cal.App.3d 513, 521; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1021-1022.)

R. PENAL CODE SECTION 12022.7, SUBDIVISION (b)

1. *People v. Galvan* (2008) 168 Cal.App.4th 846, the Fourth Appellate District, Division 2 held that, consistent with *People v. Tokash* (2000) 79 Cal.App.4th 1373, section 12022.7, subdivision (b)'s enhancement for personally causing great bodily injury causing victim "to become comatose due to brain injury or to suffer paralysis of a permanent nature" applies whether state of coma is permanent or not.

S. HEALTH AND SAFETY CODE SECTION 11370.2, SUBDIVISION (a)

1. *People v. Reed* (2005) 129 Cal.App.4th 1281, the Third Appellate District held that the enhancement within the meaning of Health and Safety Code section 11370.2, subd. (a), does not apply when prior conviction was for an attempt to commit a qualifying offense since an attempted is separate and distinct offense from the completed crime. (See *People v. White* (1987) 188 Cal.App.3d 1128, 1138.)
2. *People v. Newton* (2010) 189 Cal.App.4th 314, the Second Appellate District, Division 6 held that an enhancement under Health and Safety Code section 11370.2, subdivision (a), may be imposed in the current matter even when execution of sentence on the prior convictions were stayed under section 654 in the prior proceeding. In the current matter appellant was found guilty of two counts of sales under Health and Safety Code section 11352. Appellant had two priors that qualified under Health and Safety Code section 11370.2, subdivision (a), which the court found true in a bifurcated proceeding. The wording of Health and Safety Code section 11370.2, subdivision (a) requires an enhancement for a prior offense irrespective of whether a defendant served a prior prison term.

T. HEALTH AND SAFETY CODE SECTIONS 11370.4 (WEIGHT) AND 11372.5, SUBDIVISION (A) (LAB FEE)

1. *People v. Vega* (2005) 130 Cal.App.4th 183, the Second Appellate District, Division 7, held that an expert's testimony that a representative sample of seized cocaine was weighed, and that the weight of the sample resulted in an estimated weight of 41.4 kilograms for the entire quantity seized, was sufficient to establish that total weight of the quantity seized exceeded 40 kilograms, to satisfy Health and Safety Code section 11370.4, subd. (a), where there was no contradictory evidence nor any challenge to expert's methodology. (See *People v. Peneda* (1995) 32 Cal.App.4th 1022, 1031 [evidence of probability calculations was held sufficient circumstantial evidence to up hold a weight enhancement.].) The "criminal laboratory analysis fee" provided for by Health and Safety Code section 11372.5 does not apply to defendant convicted of conspiracy.

U. MONEY LAUNDERING ENHANCEMENT SECTION 186.10

1. *People v. Athar* (2005) 36 Cal.4th 396, the majority of the California Supreme Court, over the dissent's protestations, held that the defendant's sentence could be enhanced within the meaning of section 186.10, subd. (c)(1)(D), was properly enhanced because the conspiracy to commit money laundering is punishable in the same manner as the substantive offense of money laundering. As the dissent argued, appellant was not convicted of money laundering, but a conspiracy to commit money laundering, and for the enhancement to apply merely convicting appellant of the conspiracy is insufficient to apply the enhancement.

V. BIFURCATION ISSUES

1. *People v. Hernandez* (2004) 33 Cal.4th 1040, the California Supreme Court established that the defendant who was charged with a robbery for the benefit of a criminal street gang, within the meaning of section 186.22, subd. (b)(1), under the facts of this case, which do not necessarily establish the mental state in which the underlying offense was committed, was not error, not to bifurcate the enhancement. (See generally *People v. Calderon* (1994) 9 Cal.4th 69, 72-78 [re bifurcation of prior conviction enhancements, which had previously overruled *People v. Bracamonte* (1981) 119 Cal.App.3d 644].) The denial of the motion to bifurcate the street-gang enhancement was not an abuse of discretion where evidence of gang affiliation was also relevant to prove motive and intent behind the charged offenses, and the evidence which was admissible to prove the gang affiliation, but would have been inadmissible at trial solely on the charged offenses was not particularly inflammatory. The High Court found that if there was a request for a limiting instruction on the proper use of the gang enhancement it should be given, but given the fact that none was requested in this case, it was not error, and the danger that the jury would use such evidence improperly was not so great as to impose upon court a duty to give the instruction sua sponte.
2. *People v. Ramos* (2004) 121 Cal.App.4th 1194, the Second Appellate District, Division 3, held that the court erroneously imposed a 15-year enhancement under section 186.22, subd. (b)(5), rather than requiring service of a 15-year minimum eligible parole date, and also erroneously imposed a consecutive subordinate term under section 1170.1, subd. (a), which does not apply to indeterminate sentences. (See *People v. Felix* (2000) 22 Cal.4th 651, 659; *People v. Mason* (2002) 96 Cal.App.4th 1, 15.)
3. *People v. Ruiloba* (2005) 131 Cal.App.4th 674, the Third Appellate District held that a recording of a telephone conversation in which the defendant said he was not a “predator” because his sexual relationship with the victim, a minor at the time, “developed over time . . . and over love” sufficiently corroborated the victim’s allegations to satisfy section 803, subd. (g), which allows the prosecution of otherwise time-barred child molestation charges within one year of filing of police report if allegation is corroborated. Additionally, the Court of Appeal held that the defendant is not

entitled to a bifurcated trial on sufficiency of alleged corroborating evidence.

4. *People v. Burch* (2007) 143 Cal.App.4th 447, the Fourth Appellate District, Division 1 held, primarily based on the holding of *People v. Calderon* (1994) 9 Cal.4th 69, that bifurcation of a prior-conviction allegation was not required once evidence of the convictions was introduced to impeach defendant's testimony. Imposition of upper prison term, even post *Apprendi* and *Cunningham* did not violate appellant's right to trial by jury where trial court found that the defendant's prior convictions were a sufficient basis for its decision.

W. SECTION 20001, SUBDIVISION (C)

1. *People v. Calhoun* (2007) 40 Cal.4th 398, the California Supreme Court held that where the defendant is convicted of gross vehicular manslaughter as an aider and abettor, he may be subject to an enhancement under Vehicle Code section 20001, subdivision (c) for fleeing the scene. An upper term sentence may be imposed based on a "multiple victims" aggravating factor where the victims are named in separate counts. Based on the aforementioned issue of multiple victims, this rule does not implicate *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856.]

X. SECTION 213, SUBDIVISION (a)(1)(A) IS AN IN CONCERT ENHANCEMENT AND NOT A SENTENCING FACTOR

1. *In re Jonathan T.* (2008) 166 Cal.App.4th 474, the Fourth Appellate District, Division 2 held that a robbery in concert under section 213, subdivision (a)(1)(A) is an offense distinct from robbery under section 213, subdivision (a)(1)(B), so the "in concert" element must be pled and proven, not merely treated as a sentencing factor. (See *In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182.) Where the minor admitted the petition accusing him of robbery, which carries a maximum confinement term of six years under section 213, subdivision (a)(1)(B), the order setting the maximum term of confinement at more than six years, based on dispositional finding that the robbery was committed in concert, violated the minor's right to due process notwithstanding petitioner's assertion that the maximum confinement term would be nine years.

Y. A PENALTY PROVISION CAN BE RETRIED AFTER A HUNG JURY, BY ITSELF, AND NOT WITH THE UNDERLYING SUBSTANTIVE OFFENSE AND IS NOT BARRED BY THE FEDERAL DOUBLE JEOPARDY CLAUSE OR PENAL CODE SECTION 1023

1. *People v. Anderson* (2009) 47 Cal.4th 92, the California Supreme Court held that where a jury has convicted a defendant of an offense, in this case within section 667.61 (one strike), but deadlocked on an enhanced penalty allegation, the federal constitutional double jeopardy clause does not prevent retrial on those mistried enhancements, nor does the state statutory provision against double jeopardy of section 1023. Furthermore, the penalty provision may be retried as to the deadlocked penalty provisions alone, and not with the underlying offense.

Z. A GRANT OF A MOTION FOR A NEW TRIAL BASED ON A PENALTY ALLEGATION/FACTOR IS NOT BARRED BY THE FEDERAL DOUBLE JEOPARDY CLAUSE OR PENAL CODE SECTION 1023

1. *Porter v. Superior Court* (2009) 47 Cal.4th 125, the California Supreme Court held that where a jury convicted the defendant of several offenses and found all attached penalty allegations or factors to be true, but the trial court granted a new trial motion under section 1181 on some of the enhanced penalty factors/allegations. Such an order could not be construed as an express or implied acquittal, and as a result, it did not trigger constitutional double jeopardy protections, nor did the state statutory provision against double jeopardy (§ 1023), bar retrial. The scope of the retrial is limited to those sentencing allegations alone. The court reasoned that the judge is acting as the “13th juror” in granting the motion for a new trial, and it is the equivalent of a juror who is a “holdout” for an acquittal. In such a case, said ruling is not an acquittal, and does not bar retrial on double jeopardy grounds, but is similar to a mistrial or hung jury, where the issue can be retried. (See *People v. Serrato* (1973) 9 Cal.3d 753, 761; see also *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038-1039.)

AA. THE SUBSTANTIVE COUNT ALONE AND NOT THE ENHANCEMENT DETERMINES WHETHER THE PRINCIPAL COUNT IS DETERMINATE OR INDETERMINATE AND IF THE SUBORDINATE COUNT IS FULL TERM OR ONE-THIRD THE MIDDLE TERM

1. *People v. Sanders* (2010) __ Cal.App.4th __, reported on October 26, 2010, in 2010 Los Angeles Daily Journal 16239, the Second Appellate District, Division 8 held that, in a case where the defendant was convicted of two counts of attempted murder, without premeditation, and an enhancement was found true under section 12022.53, subdivision (d) (the 25-L enhancement), it is clear that the tail does not wag the dog; in other words, the enhancement was not part of the determinate sentence of 7 years for the attempted murder; as a result, the sentence imposed on second count, the subordinate count, should have been one-third the middle term, and court erred in imposing a fully consecutive sentence for that count. (See *People v. Montes* (2003) 31 Cal.4th 350 [generally, the substantive count determines if it is a determinate or indeterminate term, without considering the enhancement].)

VII. PROVING A PRIOR WITH AN ADOPTIVE ADMISSION

1. *People v. Thoma* (2007) 150 Cal.App.4th 1096, the Second Appellate District, Division 6, after remand from the California Supreme Court, where the Court of Appeal was ordered to follow *People v. Trujillo* (2006) 40 Cal.4th 165, the Court of Appeal found that the prior conviction for drunk driving with bodily injury did not qualify as a “strike” under the Three Strikes Law where prior conviction was based on a plea. The court could not rely on an adoptive admission within the meaning of Evidence Code section 1221, theoretically made after the plea, to find the strike prior true. The defendant did not, as part of plea, stipulate as to extent of the victim’s injuries and was not bound by court’s characterization of them. Furthermore, the police officer’s hearsay testimony at the preliminary hearing characterizing those injuries, was inadmissible for purpose of determining whether ensuing conviction was a strike. In *Trujillo*, the Supreme Court indicated that the defendant’s statement in the post-plea probation officer’s report does not describe the nature of the crime of which he was convicted and cannot be used to prove that the prior conviction was for a serious felony.

VIII. IS AN ASSAULT WITH A DEADLY WEAPON A PRIOR?

1. *People v. Baneulos* (2005) 130 Cal.App.4th 601, the Second Appellate District, Division 6 held that an assault by means likely to cause great bodily injury is not a serious felony within meaning of Three-Strikes Law or five-year enhancement statute unless the offense involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. The abstract of judgment reflecting a conviction for assault “GBI W/DEADLY WEAPON,” without saying whether defendant personally used a deadly weapon or personally inflicted great bodily injury, failed to establish that conviction was for a serious felony. The Court of Appeal acknowledged that Division 5 of the Second Appellate District came to a different result in *People v. Luna* (2003) 113 Cal.App.4th 395, however this court held that it cannot be confident that the abbreviated description of a statute prohibiting two types of criminal conduct was anything more than that particular court clerk’s shorthand method of referring to the statute under which appellant was convicted. The Court of Appeal also concurred with *People v. Haykel* (2002) 96 Cal.App.4th 146, 148-149; *People v. Winters* (2001) 93 Cal.App.4th 273, 280; and *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 622-624 when they indicated that even under the amended law post Proposition 21, a conviction of assault by means likely to cause great bodily injury is not a serious felony unless it also involves the use of a deadly weapon or actually results in the personal infliction of great bodily injury. Citing *People v. Cortez* (1999) 73 Cal.App.4th 276, 283, the court found that a plea to a criminal statute punishing alternative types of conduct is insufficient to prove that the defendant committed *each* type of conduct; and since that cannot be established in this case, it cannot be found to be a serious felony.

IX. JURY TRIAL ON OUT OF STATE PRIORS

1. *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court held, in this 5-2 opinion, that in sentencing proceedings where the defendant had two prior convictions for robbery under Nevada law, and the elements of the Nevada crime differed from the elements of the California crime, in that the Nevada convictions did not qualify on their face as convictions for purposes of sentence enhancement under California's three strikes law, the trial court did not violate the defendant's federal constitutional right to jury trial in examining the record of the prior robbery convictions to determine whether each of the offenses constituted a conviction of a serious felony. The dissent contends, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, requires that the existence of any fact increasing a defendant's sentence beyond the statutory minimum be determined by the jury base on proof beyond a reasonable doubt. *Apprendi* indicates that its decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which found an exception to this rule to prove "facts of a prior conviction," is arguably incorrect. (*Apprendi*, *supra*, 530 U.S. at p. 489.) Given this statement, the dissent indicates that *Apprendi* should be construed narrowly, rather than in the expansive manner in which it continues to interpret the law. Given the fact that the defendant never admitted the *conduct* underlying his Nevada convictions that are now being used to increase his sentence, he should have been given a right to a jury trial on the issue. I predict the United States Supreme Court will grant certiorari either in this case or a related matter.
2. *People v. Palmer* (2006) 142 Cal.App.4th 724, the Third Appellate District held that it was proper to enhance the defendant's sentence for DUI with his previous Nevada DUI convictions even though he did not have a right to a jury trial in the Nevada proceedings since the priors were classified as petty offenses. This court refused to follow *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187.
3. *People v. Nguyen* (2009) 46 Cal.4th 107, the California Supreme Court held, that a contested juvenile adjudication, even though the minor was not afforded a jury trial, it is still a prior conviction, and as a result can be used as a strike to increase appellant's sentence. The Three Strikes Law does not violate the U.S. Constitution, or the dictates of *Apprendi* or *Cunningham*, insofar as it increases the maximum sentence for an adult felony offense upon proof that the

defendant has suffered one or more qualifying “prior felony convictions,” a term that specifically includes certain prior criminal adjudications sustained under the juvenile court law while the defendant was a minor, even though there was no right to a jury trial in the juvenile proceeding. The court distinguished between a right to a jury trial for a current offense, and the lack of a jury trial for a prior offense used to enhance appellant’s sentence.

4. *People v. Skiles* REVIEW GRANTED (S180567); formerly at: (2010) 180 Cal.App.4th 1363, the Fourth Appellate District, Division 3 held that the defendant did not have a Sixth Amendment right under *Apprendi* to have a jury decide whether his out of state manslaughter conviction constituted a serious felony for purposes of the Three Strikes law. Manslaughter, defined under Alabama law as recklessly causing the death of another, is a serious felony for Three Strikes Law purposes unless the victim is the defendant’s accomplice. Alabama manslaughter conviction was proved to be a strike by sufficient evidence, including a copy of the original certified copy of the indictment (see *People v. Coon* (2009) 173 Cal.App.4th 258, 263), which alleged that defendant ran a red light and drove his car into a vehicle being operated by the victim and in so doing recklessly caused the death of the victim, along with an official record of defendant’s guilty plea to that charge.

X. FEDERAL AND STATE DOUBLE JEOPARDY AND SECTION 654 ISSUES

1. *People v. Lopez* (2004) 119 Cal.App.4th 132, the Second Appellate District, Division 6 held that section 654 precludes separate sentences for unlawful possession of a firearm and unlawful possession of the ammunition inside the firearm. (Cf. *People v. Miller* (1977) 18 Cal.3d 873, 887 [654 applies when there is an indivisible course of conduct].)
2. *People v. Williams* (2004) 120 Cal.App.4th 209, the Fourth Appellate District, Division 2 held, contrary to the well reasoned opinion in *People v. Garcia* (2003) 107 Cal.App.4th 1159, wherein the Court of Appeal held that a defendant could only be found guilty of one count of evading, and not for as many counts as number of police officers giving chase, this Court of Appeal found that a

violation of section 2800.2, is a crime of violence for purposes of the multiple-victim exception to section 654, and therefore, a defendant who violated section 2800.2 while fleeing from the scene of the robbery was properly convicted of both crimes. The Court of Appeal did find that the violation of Vehicle Code section 10851, should have been stayed, when imposing a penalty of a violation of section 2800.2. As a result, where the defendant is convicted of multiple offenses, and receives a consecutive sentence in the original sentencing hearing, one of which is for an offense for which the punishment is prohibited under section 654, the prosecution is entitled to a remand so that court may exercise its discretion to impose a consecutive term for the offense for which the defendant was properly convicted and had previously received a concurrent term. The prosecution did not have to cross appeal, since the original sentence was unauthorized. On remand the trial court has the authority to modify all aspects of the sentence. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614.)

3. *People v. Ausbie* (2004) 123 Cal.App.4th 855, the Fifth Appellate District held that when there are separate victims, an enhancement within the meaning of 12022.7 can be applied to each victim.
4. *People v. Britt* (2004) 32 Cal.4th 944, the California Supreme Court held that the defendant, a registered sex offender who failed to notify law enforcement agencies of his change of address when he moved from one county to another cannot be prosecuted in one county for the failure to notify law enforcement that he was leaving the county, and then subsequently prosecuted separately in the other county for the failure to register in that county when the person took up residence there. An appellant who fails to notify authorities in the county of his former residence of his departure, and who also fails to notify authorities in the county of his new residence upon his arrival, may be charged with both offenses in either county, but when the prosecution knows or should know of both offenses, appellant may be prosecuted for them only once (see *Kellett v. Superior Court* (1966) 63 Cal.2d 822), and may be sentenced only once for one or the other convictions within the meaning of section 654.
5. *People v. Davey* (2004) 122 Cal.App.4th 1548, the First Appellate District, Division 2 held that a defendant who commits a single act

of indecent exposure within the meaning of section 314.1, and the act is witnessed by 2 minors simultaneously, can only be sentenced on one count pursuant to section 654. (Cf. *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088-1090 [can punish multiple times for a single episode of violent conduct].) The multiple victim exception to section 654 does not apply as the act is not one of violence, nor is there a separate criminal objective to the single act.

6. *People v. Oates* (2004) 32 Cal.4th 1048, the California Supreme Court held that section 12022.53, subd. (d), the 25 to life enhancement for each crime where the defendant personally discharged and injured another, but which subd. (f) bars the imposition of more than one such penalty “for each crime,” requires imposition of five enhancements on a defendant convicted of five counts of premeditated attempted murder for firing two shots into a group of five persons, injuring one of them. The multiple enhancements are not barred by section 654's prohibition against multiple punishments for a single act or omission.
7. *United States v. Patterson* (9th Cir. 2004) 381 F.3d 859, the Ninth Circuit Court of Appeal held that the validity of the defendant's guilty plea in marijuana possession case was in doubt under *Apprendi* because the number of marijuana plants, a factor in sentencing, was not stipulated to by defendant nor found by a jury beyond a reasonable doubt, the order vacating his plea and subsequent trial did not deprive the defendant of freedom from double jeopardy.
8. *People v. Picado* (2004) 123 Cal.App.4th 1216, the First Appellate District, Division 5, held that section 654's ban on multiple punishments for a single crime does not bar consecutive sentences where the defendant was convicted of assault on five separate victims in a single incident (see *People v. Miller* (1977) 18 Cal.3d 873, 885; see also *People v. Solis* (2001) 90 Cal.App.4th 1002, even if multiple convictions were based on his being an aider and abettor. (See *People v. Hall* (2000) 83 Cal.App.4th 1084, 1092-1093.)
9. *People v. Cobb* (2004) 124 Cal.App.4th 1051, the Second Appellate District, Division 8 held that where the defendant and two other persons simultaneously shot and killed a single victim, resulting in a

jury findings that the defendant was personally armed, and that he participated in a crime in which another principal was armed, the defendant was subject to single enhancement pursuant to section 12022.53, subd. (f). The court erred by imposing two enhancements as the matter was not within the meaning of *People v. Oates* (2004) 32 Cal.4th 1048, wherein the Supreme Court found that multiple enhancements can be imposed when there is more than one victim.

10. *Sons v. Superior Court* (2004) 125 Cal.App.4th 110, the Fifth Appellate District, after an analysis of *People v. Batts* (2003) 30 Cal.4th 660, wherein the California Supreme Court had held that under certain circumstances, wherein the prosecution committed intentional misconduct, in order to trigger a mistrial, they were barred by the double jeopardy clause of the state and federal constitutions, held that the facts did not warrant such a remedy in this case. Here, the prosecutor's failure to disclose material, exculpatory evidence in first trial, even if knowing and willful, does not bar retrial following a successful habeas corpus petition under double jeopardy clauses of the federal and state constitutions and constitutional requirements of due process of law.
11. *Smith v. Massachusetts* (2005) 543 U.S. 462 [160 L.Ed.2d 914, 125 S.Ct.1129], the United States Supreme Court held that where the court granted the defendant's motion for acquittal after the prosecution rested (similar to § 1118), on one count, based on the insufficiency of the evidence, but then reconsidered and altered its ruling prior to the submission of the case to the jury, reinstating that count, said ruling violated the Double Jeopardy Clause. (See *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573.) Where, after an unqualified mid-trial acquittal on one count, wherein the trial has proceeded to the defendant's introduction of evidence on the remaining counts, the acquittal must be treated as final unless the availability of reconsideration has been plainly established by a pre-existing state rule, or case authority, expressly applicable to mid-trial rulings on the sufficiency of the evidence.
12. *People v. Flores* (2005) 129 Cal.App.4th 1401, the Fourth Appellate District, Division 3 held that the separate punishments for murder and for conspiracy to batter a separate victim, wherein the murder occurred during the course of the conspiracy, do not violate section

654's ban on multiple punishments for the same crime, since the murder was not part of the conspiracy. (See *In re Cruz* (1966) 64 Cal.2d 178, 181 [if the conspiracy had an objective apart from an offense for which the defendant is punished, he may be properly sentenced for the conspiracy as well].) The enhancement under section 12022.53 and a separate sentence for carrying a gun in the carrying a firearm while an active participant in a criminal street gang did not violate section 654 where the evidence established that the crime for which the enhancement was imposed and the gun possession offense involved separate conduct and separate intents. The court acknowledged that there is a split of authority as to whether section 654 applies to enhancements, (see *People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519 [does not apply]; *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817-818; *People v. Arndt* (1999) 76 Cal.App.4th 387 [§ 654 does apply to enhancements that go to the nature of the offense and not to the status of the offender]; see also *People v. Akins* (1997) 56 Cal.App.4th 331; *People v. Palacios* (2005) 126 Cal.App.4th 859 [§ 654 does apply to enhancements), but determined that on these facts, that it did not.

13. *People v. Martin* (2005) 133 Cal.App.4th 776, the Second Appellate District, Division 2 held that separate sentences for resisting arrest (§ 69) and battery with injury on a peace officer (§ 243, subd. (c)(2)), does not violate section 654, where the multiple victim exception comes into play. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023.) Here, the defendant resisted arrest by officers other than the one who is battered, and since battery on a police officer is a crime of violence that qualifies for the multiple victim exception, the court did not err in imposing the two crimes concurrent to each other rather than applying section 654, even though it was during the same incident. If the crimes had not been classified as crimes of violence, then the provisions of section 654 would have been applicable.
14. *People v. Vasquez* **REVIEW GRANTED** (S141677) formerly at: (2006) 136 Cal.App.4th 898, the Second Appellate District, Division 2 held that it was not err not to stay imposition of sentence, within the meaning of section 654 for assault, where the defendant was convicted of first degree burglary as well as assault and attempted

rape; since there were two occupants of the burgled residence in addition to the victim of the assault.

15. *People v. Le* (2006) 136 Cal.App.4th 925, the Sixth Appellate District held that separate sentences for burglary and robbery violated the section 654 ban on multiple punishments for same crime where both offenses were committed with a single intent (see *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297), to steal from a store, and force was used only against the store manager and only in a struggle over the store's merchandise; therefore, the multiple victim exception to section 654 was not applicable. (See *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) The section 654 error was an unauthorized sentence within the meaning of *People v. Scott* (1994) 9 Cal.4th 331, 354, and therefore the failure to object did not waive the issue. Restitution and parole revocation fines are "punishment" within meaning of section 654; therefore, the lower court erred in treating the robbery and burglary convictions as separate in calculating such fines. Where the trial court indicated its intent to impose the minimum parole revocation and restitution fines and erroneously calculated such minimums, the Court of Appeal can reduce such fines to properly calculated minimum even though the trial court would have had discretion to impose larger fines.
16. *People v. Brown* (2006) 140 Cal.App.4th 76, on rehearing, the Third Appellate District held that the double jeopardy provisions of state and federal constitutions, and provisions of section 654, subd. (a), barring multiple prosecutions for the same act or omission, apply only to successive prosecutions and not to a continued prosecution on remaining charges after a jury is partially unable to reach a verdict. (See *Richardson v. United States* (1984) 568 U.S. 317, 323.) Constitutional and statutory protections against double jeopardy do not bar retrial of the defendant, who was acquitted of elder abuse, to once again be tried on charges of assault and battery as to which jury deadlocked, where acquittal of the elderly abuse charge may have been based on the failure to prove that the defendant knew or reasonably should have known that the victim was over the age of 65 years.
17. *People v. Reed* (2006) 38 Cal.4th 1224, the California Supreme Court held that where the defendant was charged with and convicted

of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), carrying a concealed firearm (§ 12025, subd. (a)), and carrying a loaded firearm while in a public place (§ 21031, subd. (a)), all arising out of the same act, and where the information alleged as to all three offenses that the defendant was a convicted felon so that, as charged, he could not commit the crimes of carrying a concealed firearm and carrying a loaded firearm while in a public place without also being a felon in possession of a firearm, section 954 (see also *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034), which prohibits convictions based on necessarily included offenses, did not prevent the defendant's conviction of all three charges. The courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an "uncharged" crime, but, only the statutory elements in deciding whether a defendant may be convicted of multiple "charged" crimes.

18. *People v. Brandon* **REVIEW GRANTED** (S149371); formerly at: (2006) 145 Cal.App.4th 1002, the Second Appellate District, Division 5 held that the court properly imposed separate sentences for pandering (§ 266i) and pimping (§ 266h) or procuring a minor (§ 266j) with respect to three victims, where there was evidence of separate criminal objectives, so that the sentences did not violate section 654. The court erred, under section 654, in sentencing defendant for both false imprisonment and attempting to pander by use of threats, where the defendant was convicted of both offenses by evidence of same conduct on single occasion.
19. *People v. Navarro* (2007) 40 Cal.4th 668, the California Supreme Court held that where there was insufficient evidence to support a conviction for attempted kidnapping during a carjacking (see § 209.5, subd. (a)), since there was no movement of the vehicle and therefore no completed carjacking, the appropriate remedy was not to modify the judgment by striking the original single conviction, and substituting convictions for both attempted kidnapping and attempted carjacking. The provisions of sections 1181, subd. (6), nor 1260 provide for this procedure. The Court of Appeal erred when it found that the substitution of two "strike" convictions for a single such conviction did not cause an unconstitutional increase in punishment. The Supreme Court clearly indicated that a one for one

modification is fine, but that they were reluctant, and constrained from permitted a two for one switch.

20. *People v. Brown* (2007) 148 Cal.App.4th 911, the Fourth Appellate District, Division 1 held that the court did not violate double-punishment prohibition of section 654 when it imposed sentence on convictions for attempted robbery, assault with a deadly weapon, and attempted murder arising out of a single event. There was evidence that the various offenses did not arise from single objective of robbing victim but rather separate motives that were not derived at the same time, to rob victim, then to hurt victim after robbery attempt failed, then to kill victim by shooting him. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.) Since there was more than one objective, the section did not violate the multiple punishment rule of section 654 (see *People v. Beamon* (1973) 8 Cal.3d 625, 636-637), by imposing firearm use enhancements on both defendant's attempted murder and attempted robbery convictions based on same discharge of firearm where it concluded that use of gun in attempting to rob victim had a different objective than later use of gun to attempt to kill victim.
21. *Porter v. Superior Court* (2007) 148 Cal.App.4th 889, the Sixth Appellate District held that where the jury found the defendant guilty of two counts of attempted murder and made true findings as to various special allegations, including that the crimes were premeditated and were committed for the benefit of a street gang, and trial court ordered a new trial (§ 1181), as to those allegations before proceeding to pronounce judgment as to the convictions and other enhancements, double jeopardy barred retrial on the special allegations. (*Brown v. Ohio* (1977) 432 U.S. 161, 166 [double jeopardy bars a successive trial on an offense not charged in the original indictment once jeopardy attaches. One cannot be tried a second time when he is found not guilty of either the greater offense or a lesser included offense of the greater unless each requires proof of an additional fact that the other does not].) A trial court's granting of a motion for a new trial should not be construed as an acquittal unless the record unmistakably indicates the trial court applied the substantial evidence test and concluded that no reasonable trier of fact could find guilt beyond a reasonable doubt. (See *Hudson v. Louisiana* (1981) 450 U.S. 40, 44 [67 L.Ed.2d 30,

34, 101 S.Ct. 970,972; *People v. Trevino* (1985) 39 Cal.3d 667, 694-695.) Generally, the granting of a motion for a new trial does not bar a retrial based on double jeopardy grounds. (*People v. Serrato* (1973) 9 Cal.3d 753, 762.) By definition, a new trial ordered by a judge acting as a “13th juror” is not construed as an acquittal, and it is not the same as granting a motion to dismiss pursuant to section 1118.1. Here, the double jeopardy bar is implemented by section 1023 and the doctrine of included offenses. (*People v. Fields* (1996) 13 Cal.4th 289, 305-306.)

22. *People v. Brenn* (2007) 152 Cal.App.4th 166, the Fourth Appellate District, Division 3, held that here the defendant was sentenced to prison for attempted manslaughter and was also convicted of aggravated assault with a great bodily injury enhancement based on same occurrence, it was error to impose concurrent prison term for the latter offense, and at the same time say it was stayed pursuant to section 654. The proper disposition was to stay imposition of sentence pursuant to section 654. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.)
23. *People v. Palacios* (2007) 41 Cal.4th 720, the California Supreme Court held that a section 12022.53, subd. (d) firearm enhancements, are not limited by the multiple punishment prohibition of section 654. Appellant was convicted of one count each of attempted murder, kidnapping for carjacking, and kidnapping for robbery, where one shot was fired, at one victim. The court permitted the imposition of the gun use enhancement on all three counts.
24. *People v. Garcia* (2007) 153 Cal.App.4th 1499, the Fourth Appellate District, Division 3 held that consecutive terms for section 168.22, subd. (a) and section 186.22, subd. (b) do not violate section 654's prohibition against multiple punishments for the same crime. (See *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1468 [the intents are theoretically different for the substantive crime than for the enhancement]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.)
25. *People v. Sloan* (2007) 42 Cal.4th 110, the California Supreme Court held that an enhancement is not considered for section 654 purposes, within the meaning of *People v. Pearson* (1986) 42 Cal.3d 351, 355 which prohibits multiple convictions based on necessarily included

offenses even if the allegation subjects the defendant to the possibility of additional punishment. The defendant was convicted of willful infliction of corporal injury on a spouse (§ 273.5, subd. (e)(1)), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) and battery with serious bodily injury (§ 243, subd. (d)), and the great bodily injury enhancement within the meaning of section 12022.7, subd. (a) applied to all of the aforementioned counts. Pursuant to *People v. Reed* (2006) 38 Cal.4th 1224, 1231, wherein the High Court held that courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an “uncharged” crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple “charged” crimes, neither the ban on multiple punishment within section 654, nor principles of federal double jeopardy protection, require an exception from *Reed* in this case simply because multiple convictions otherwise permitted under section 954, and the legal elements test in theory might give rise to impermissible multiple punishment in future criminal proceedings should the defendant reoffend. Each of the assault counts can be considered a lesser included offense of the corporal injury offense, when the great bodily injury enhancement is taken into account. If the violation of section 273.5 is considered without the great bodily injury enhancement, then the assault counts are not lesser included offenses. The argument that improper multiple punishment might stem from future use of multiple convictions under recidivist sentencing statutes, like the Three Strikes Law, raises a question that is speculative and must wait until a future case arises.

26. *People v. Izaguirre* (2007) 42 Cal.4th 126, the California Supreme Court held that firearm-related enhancements do not violate the right to due process nor the right to jury trial within the meaning of *Apprendi*, when they are used to increase punishment and not to elevate the seriousness of the underlying offense. Since enhancements are not legal elements of the offenses to which they attach, they are not considered in defining necessarily included offenses under *People v. Reed* (2006) 38 Cal.4th 1224.
27. *People v. Fielder* (2007) 154 Cal.App.4th 712, the Fourth Appellate District, Division 1 held that a registered sex offender’s act of failing

to notify authorities of his whereabouts on three separate occasions were separate acts for which three separate punishments could be imposed. (See *People v. Meeks* (2004) 123 Cal.App.4th 695, 705-706; See also *People v. Davis* (2002) 102 Cal.App.4th 377.)

28. *People v. Murphy* (2007) 154 Cal.App.4th 979, the Third Appellate District held that possessing rock cocaine for sale is not a necessarily included offense of selling the same rock under statutory elements test. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 988; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522.) Possession of a controlled substance is not an essential element of the crime of selling that substance. The defendant was properly convicted of possessing cocaine base for sale and of sale of cocaine base under charging allegations test even where the information did not state whether the cocaine base referred to in first count was the same as that referred to in second count. Where trial evidence showed that the substance was the same in each count, trial court properly stayed conviction on one count to comply with section 654 ban on multiple punishments for same crime.
29. *People v. Perry* (2007) 154 Cal.App.4th 1521, the Second Appellate District Division 8, held that there was substantial evidence to establish a burglary and robbery within the meaning of *People v. Estes* (1983) 147 Cal.App.3d 23, considering the fact that the victim testified that he returned to his car, which had been locked with closed windows, and discovered defendant inside it; that defendant jumped out holding victim's car stereo in one hand and a screwdriver or ice pick in the other hand, and took a fighting stance prior to running from the scene. Where the second degree burglary and the robbery of the property were part of a single course of conduct, (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208), section 654's prohibition against multiple punishment for the same crime requires that the burglary conviction be stayed.
30. *People v. Garcia* (2007) 155 Cal.App.4th 929, the Second Appellate District, Division 8 held that, section 654 was not violated where multiple persons were fired at in count 3, including the victim in count 2, and therefore the multiple victim exception to section 654 applied. The court also rejected appellant's contention that section 654 precluded the imposition of the section 12022.53 enhancement

on top of the murder conviction in count 1. (See *People v. Sanders* (2003) 111 Cal.App.4th 1371.)

31. *People v. Martinez* (2007) 156 Cal.App.4th 851, the Second Appellate District, Division 6 held that the imposition of the upper term did not violate *Cunningham*, and was within the reaches of *Black II* since appellant's priors were of increasing seriousness (rule 4.421(b)(2)), he was on parole at the time of the offense, and he had numerous prior convictions for DUI.
32. *People v. Rodriguez* (2007) 157 Cal.App.4th 14, the Second Appellate District, Division 4, held that where a gang member's single act of firearm possession both subjects him to a 4 year firearm enhancement under section 12022.5 and elevates the underlying offense to a violent felony under section 667.5, subd. (c)(8), thereby subjecting him to a 10-year gang enhancement under section 186.22, subd. (b)(1), 654's ban on multiple punishment requires the court to strike the lesser enhancement. Under the language of section 12022.53, there is an exception for section 654 that does not exist in section 12022.5 or 186.22; therefore, given the differing language of the sections, the lesser cannot be applied, due to section 654, when the greater enhancement is imposed. In essence, the single act of using a firearm cannot be used "both" to enhance his punishment for assault and to augment the enhanced punishment he will necessarily receive for having committed the assault for the benefit of the gang. As a result, section 12022.5 is similar to a lesser included offense as he would not have been eligible for the augmented gang enhancement for the gang enhancement under section 186.22, subd. (b)(1)(C) absent the jury's determination that he violated section 12022.5.
33. *People v. Andra* (2007) 156 Cal.App.4th 638, the Third Appellate District held that where the defendant was convicted of two counts of identity theft, one count of vehicle theft, and one count of obtaining money by false pretenses, the court's sentence of consecutive terms for each count did not violate section 654, since the crimes were committed weeks apart and had different victims. This supported the court's finding that the crimes were committed with separate intents, and therefore did not violate section 654. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713 (re: substantial evidence supports intent and objective finding].

34. *People v. Muhammad* (2007) 157 Cal.App.4th 484, the First Appellate District, Division 5 held that, a defendant can only be “convicted” of one count of section 646.9, as other subds in the section are merely penalty provisions for stalking. Subds. (b), (c)(1), and (c)(2) are penalty provisions triggered when the offense of stalking as defined in subd. (a) is committed by a person with a history of misconduct. Therefore, the Court of Appeal imposed sentence on section 646.9, subd. (c)(2) and dismissed the other three counts of stalking. (See *People v. Ryan* (2006) 138 Cal.App.4th 360, 371.) SEE SIMILAR ISSUE INFRA THIS SECTION NO. 47
35. *People v. Correa* **REVIEW GRANTED** (S163273) formerly at: (2008) 161 Cal.App.4th 980, the Third Appellate District held that a defendant found in possession of seven firearms was properly sentenced on seven separate counts. Since possession of each firearm was a distinct offense, such sentencing did not violate section 654. To the extent that a “separate and individual purpose” for each offense is required to treat possession of multiple firearms as multiple crimes, the requirement was met on the basis of the evidence that each weapon had its own ammunition and, therefore, each could have served a different purpose or been used to commit a different crime. Given the fact that the guns were of different makes and calibers, the Court of Appeal found that the defendant harbored separate objectives for possessing each one, and since they were being moved into the defendant’s home and he was discovered hiding in a closet under the stairs, that supported the inference that he was stockpiling different firearms for a variety of future uses. **THIS CASE PRESENTS THE FOLLOWING ISSUE:** Was defendant properly sentenced on multiple counts of being a felon in possession of a firearm where he was discovered in a closet with a cache of weapons?
36. *People v. Martinez* (2008) 161 Cal.App.4th 754, the Fourth Appellate District, Division 2, held that where the evidence established that the defendant presented victim with a stack of documents to be signed and that he affirmatively misrepresented to her that their purpose was to help her with her financial problems and/or help her file a bankruptcy, when his actual purpose was to gain a security interest in her home, was sufficient to establish the

“trickery and deceit” element of forgery. (See § 470; *People v. Parker* (1967) 255 Cal.App.2d 664, 672.) Additionally, where the defendant also induces the victim to sign documents, while failing to disclose their true nature, may be convicted of forgery regardless of whether defendant makes an affirmative misrepresentation. This case is distinguishable from *People v. Looney* (2004) 125 Cal.App.4th 242, in that the defendant failed to disclose the true nature of the documents. The defendant who unlawfully induces the victim to sign single document in more than one place may only be convicted of one count of forgery.

37. *People v. Bragg* (2008) 161 Cal.App.4th 1385, the Third Appellate District held that multiple street gang enhancements, within the meaning of section 186.22, subdivision (b)(1), to sentences based on attempted murder convictions arising out of single incident involving multiple victims do not violate section 654's ban on multiple punishments for a single crime. (See *People v. Oates* (2004) 32 Cal.4th 1048, 1063.)
38. *People v. Moseley* (2008) 164 Cal.App.4th 1598, the Fifth Appellate District held that where defendant was convicted of possession of drugs for purpose of sale (§§ 11378 and 11359), and maintaining a location for purpose of selling drugs (§ 11366), the trial court was not required to stay sentencing for any of the offenses under section 654, because the defendant's intent in maintaining a consistent location for selling drugs was independent of his objective to sell the specific bags of drugs in his possession at the time of his arrest.
39. *People v. Briones* (2008) 167 Cal.App.4th 524, the Second Appellate District, Division 6 held that the defendant who was found guilty of conspiracy to possess heroin for sale and conspiracy to possess methamphetamine for sale as part of a single conspiracy to possess both drugs, could only be convicted for one act of conspiracy to possess drugs for sale. Where defendant's conspiracy and possession of drugs for sale arose from same set of operative facts, (see *People v. Lawrence* (2000) 24 Cal.4th 219 [re: same set of operative facts]), the defendant could not be punished for both conspiracy and substantive offenses that were object of conspiracy. (See *People v. Ramirez* (1987) 189 Cal.App.3d 603.) Where defendant possessed two types of drugs in large amounts, evidence

supported inference that defendant intended multiple sales to different customers, and defendant could be sentenced for two counts of possession with intent to sell. (See *People v. Blake* (1998) 68 Cal.App.4th 509.)

40. *People v. Conners* (2008) 168 Cal.App.4th 443, the Second Appellate District, Division 8 held that the court erred in failing to stay sentence under section 654, on one count of receiving stolen property, when sentence was imposed on a count for money laundering since there was only one criminal intent or objective. (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603 [there was one indivisible course of conduct.]) Here, there was only one intent, to keep the stolen funds.
41. *In re Noelle M.* (2008) 169 Cal.App.4th 193, the Third Appellate District held that the Court of Appeal found that the juvenile court did not err in imposing consecutive terms of confinement for each of five separate offenses of selling methadone where minor admittedly sold drugs to seven others. The minor's culpability increased with each illegal act of selling drug, each sale was unique, and each sale constituted a separate objective. (Cf. *People v. Perez* (1979) 23 Cal.3d 545, 549-553 [each sex act constitutes a separate objective].) Where there is multiple sales of the same drug to the same person, there is an indivisible course of conduct, and section 654 is implicated.
42. *People v. Harbert* (2009) 170 Cal.App.4th 42, the First Appellate District, Division 2 held that Under Vehicle Code sections 20003 and 20001, the requirement of proof of knowledge that an accident occurred (see *People v. Hamilton* (1978) 80 Cal.App.3d 124, 132), may, like the requirement of knowledge of injury, be satisfied by proof of constructive knowledge. Additionally, the trial court did not err in giving CALJIC 12.70, because proof of actual knowledge that an accident occurred was not required. The prosecutor's use of the theory of imputed knowledge, based on evidence of the defendant's conduct after the accident was not misconduct. Furthermore, the trial court did not err in sentencing defendant pursuant to section 12022.7, which prohibits the enhancement where great bodily injury is an element of offense, because gravamen of the Vehicle Code section 20001 offense is leaving scene (see *People v.*

Escobar (1991) 235 Cal.App.3d 1504, 1509), not the initial injury to the victim, with no element of personal injury to the victim. However, the sentence on the section 12022.7 enhancement must be stayed pursuant to section 654. (See *People v. Sloan* (2007) 42 Cal.4th 110, 116.)

43. *People v. Kenefick* (2009) 170 Cal.App.4th 114, the Third Appellate District held that where other forgery convictions were preliminary steps in plan to steal victim's money, for which defendant was convicted of theft, securities fraud, and burglary, the trial court should have stayed sentence under section 654 to avoid multiple punishment. (*People v. Beamon* (1973) 8 Cal.3d 625, 637; see also *People v. Curtin* (1994) 22 Cal.App.4th 528 [generally only punishment on burglary or forgery as it was an indivisible course of conduct].)
44. *People v. Jones* (2009) 178 Cal.App.4th 853, the Fourth Appellate District, Division 2 held that the trial court did not abuse its discretion by relying upon defendant's prior conviction both to double the base term as required by the Three Strikes law (§ 667, subd. (e)(1)), and to add a five-year prior-serious-felony enhancement as required by section 667, subdivision (a)(1), and as one of several aggravating factors justifying upper term under section 1170, subdivision (b). The use of the same prior conviction both to impose a 5-year prior-serious-felony enhancement under section 667, subdivision (a)(1), and to impose a prior-arson enhancement under section 451.1, subdivision (a), does not violate section 654's ban on multiple punishment for same crime, as the court indicated that they are both "status enhancements" and section 654 does not apply to status enhancement based on this court's analysis.
45. *People v. Felix* (2009) 172 Cal.App.4th 1618, the Second Appellate District, Division 8 held that the court did not err in sentencing appellant concurrently for shooting into an inhabited dwelling even if the purpose of the shooting was to accomplish the attempted murder, charged in count 1, given the fact there were multiple victims in the residence, even though the defendant was attempting to kill one particular victim. (*People v. McFarland* (1989) 47 Cal.3d 798, 803 [the multiple victim exception to section 654 which

allows for a separate punishment for each crime of violence against a different victim, even though all crimes are part of a single course of conduct with a single principle objective]; see also *People v. Anderson* (1990) 221 Cal.App.3d 331, 335-339.)

46. *People v. Hairston* (2009) 174 Cal.App.4th 231, the Third Appellate District held that based on the wording of section 148, a defendant can be convicted of separate misdemeanor counts of resisting a peace officer in the discharge of duty based on each peace officer he resisted even if defendant's acts of resisting arrest were one continuous act. The court distinguished *People v. Garcia* (2003) 107 Cal.App.4th 1159, which holds that in a prosecution for evading (§ 2800.2), the prosecutor was not free to charge three counts of evading even though the defendant led three police vehicles on a lengthy high-speed chase. Substantial evidence supported the trial court's conclusion that the defendant formed a new and independent intent to avoid arrest by each officer with each officer he encountered, and therefore section 654 is not implicated.
47. *People v. Ramon* (2009) 175 Cal.App.4th 843, the Fifth Appellate District held that, the defendant could not be "convicted" of both carrying a loaded firearm while a member of a criminal street gang (§ 12031, subd. (a)(2)(C)), and of carrying a loaded firearm for which he was not the registered owner (§ 12031, subd. (a)(2)(F)), based on his possession of the same firearm because they are not separate offenses, but instead are different penalty provisions for section 12031. (See *People v. Muhammad* (2007) 157 Cal.App.4th 484, 490-491.) Therefore, it was error to stay one of the gun offenses pursuant to section 654.
48. *People v. Cantrell* (2009) 175 Cal.App.4th 1161, the Fourth Appellate District, Division 2 held that a stayed sentence, pursuant to section 654, cannot be consecutive to a principal sentence, and a term cannot be both consecutive and stayed simultaneously because the two are mutually exclusive. (See § 1170.1, subd. (a)).
49. *People v. Anderson* (2009) 47 Cal.4th 92, the California Supreme Court held that where a jury has convicted a defendant of an offense, in this case within section 667.61 (one strike), but deadlocked on an enhanced penalty allegation, the federal constitutional double

jeopardy clause does not prevent retrial on those mistried enhancements, nor does the state statutory provision against double jeopardy of section 1023. Furthermore, the penalty provision may be retried as to the deadlocked penalty provisions alone, and not with the underlying offense.

50. *Porter v. Superior Court* (2009) 47 Cal.4th 125, the California Supreme Court held that where a jury convicted the defendant of several offenses and found all attached penalty allegations or factors to be true, but the trial court granted a new trial motion under section 1181 on some of the enhanced penalty factors/allegations. Such an order could not be construed as an express or implied acquittal, and as a result, it did not trigger constitutional double jeopardy protections, nor did the state statutory provision against double jeopardy (§ 1023), bar retrial. The scope of the retrial is limited to those sentencing allegations alone. The court reasoned that the judge is acting as the “13th juror” in granting the motion for a new trial, and it is the equivalent of a juror who is a “holdout” for an acquittal. In such a case, said ruling is not an acquittal, and does not bar retrial on double jeopardy grounds, but is similar to a mistrial or hung jury, where the issue can be retried. (See *People v. Serrato* (1973) 9 Cal.3d 753, 761; see also *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038-1039.)
51. *People v. Tran* REVIEW GRANTED (S176923); formerly at: (2009) 177 Cal.App.4th 138, the Fourth Appellate District, Division 3 held that the trial court erred in sentencing the defendant under section 186.22, for the same acts as his murder (§ 187), and attempted murder (§ 664/187) convictions, where the evidence indicated that he believed he was aiming at rival gang members each time he pulled the trigger; therefore, there was only one intent, to murder the gang member, therefore, the punishment for the attempted murder and murder controls, and an enhancement for the gang offense would violate double jeopardy. (See *People v. Vu* (2006) 143 Cal.App.4th 1009.)
52. *People v. Alvarez* (2009) 178 Cal.App.4th 999, the Fourth Appellate District, Division 3 held that since each charged act was separate and distinct, and none was necessary to accomplish the others, section 654 did not come into play; but where two crimes were the means by

which two other crimes were accomplished, the defendant's sentence for the lesser crimes had to be stayed pursuant to section 654. (*People v. Perez* (1979) 23 Cal.3d 545, 553 [§ 654 will not apply in a sex case unless the crime unless the crimes were either incidental to or the means by which another crime was accomplished].)

53. *People v. Sanchez* (2009) 179 Cal.App.4th 709, the Fourth Appellate District, Division 2 held that section 654's prohibition against multiple punishments for the same crime precludes sentencing the defendant for both the substantive offense of gang participation and for the underlying crime. (See *People v. Vu* (2006) 143 Cal.App.4th 1009.)
54. *People v. Tarris* (2009) 180 Cal.App.4th 612, in 2009 Los Angeles Daily Journal 17767, the Fourth Appellate District, Division 2 held that the trial court's power to impose other reasonable conditions of probation pursuant to section 1203.1 included the authority to require the defendant to reimburse the county for the costs of investigating defendant's crime as well as clean-up costs. It can be argued that this is contrary to *People v. Baker* (1974) 39 Cal.App.3d 550, 559 which does not permit the costs of prosecuting or rehabilitating criminals. However, the trial court erred in imposing restitution fines under Health and Safety Code section 25189.5, subdivision (e) for defendant's convictions for illegal disposal and transportation of hazardous waste since defendant's actions constituted an indivisible course of conduct, committed with a single intent and objective. (See *People v. Hester* (2000) 22 Cal.4th 290, 294.) Imposing duplicate fines constituted multiple punishment for the same act or course of conduct in violation of section 654, which was applicable even though defendant's sentence was suspended, and the Health and Safety Code section 25189.5, subdivision (e) fine was imposed as a condition of probation. The trial court erred in imposing five court security fees when defendant was convicted of only three offenses and in imposing a court construction fee because that fee statute was not yet in effect at time of defendant's sentencing.
55. *People v. Thompson* (2009) 180 Cal.App.4th 974, in 2009 Los Angeles Daily Journal 18051, the Fourth Appellate District, Division 1 held that the trial court did not err by imposing consecutive sentences on defendant's convictions for manslaughter and driving

under the influence, where two persons are injured or killed, as section 654 does not prohibit such a sentence. (See *People v. McFarland* (1989) 47 Cal.3d 798, 803-804.)

56. *People v. Alford* (2010) 180 Cal.App.4th 1463, the Third Appellate District held that when it is determined by the trial court that section 654 precludes imposition of a prison term as to a particular count, it must impose sentence on that count and then stay execution of that sentence. The court merely cannot refrain from imposing sentence on those counts, except where probation is granted. California Rules of Court, Rule 4.424, is inconsistent with section 654 to the extent it provides for a stay of imposition of sentence, rather than for imposing sentence and staying execution.
57. *People v. Wynn* (2010) 184 Cal.App.4th 1210, the Fourth Appellate District, Division 1 held that the trial court did not err in failing to stay, pursuant to section 654, where substantial evidence supported the finding that the defendant had a different objective in committing a burglary than the assault where he walked out of a store without paying for an item, then threw the item on the ground, and did not attempt to retrieve it before assaulting loss prevention officer who had attempted to detain defendant. (*People v. Vidaurri* (1980) 103 Cal.App.3d 450, 465-466 [substantial evidence supported finding of two different intents].) The trial court did not err in failing to stay the possession of the nunchaku where he carried them into the store, before the assault took place, and said he carried the weapon because people were afraid of them. It was not unreasonable for the trial court to conclude that the possession of the weapon was distinctly antecedent and separate from the offense of assault with a deadly weapon. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413.) If there was no evidence of antecedent possession, then it would be stayed pursuant to section 654. (*People v. Bradford* (1976) 17 Cal.3d 8, 22; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.) However the court did err in failing to stay, pursuant to section 654 the gun enhancement within the meaning of section 12022, subdivision (b)(1), which occurred during the commission of a burglary when it was based on the same act as the assault counts. (See *People v. Britt* (2004) 32 Cal.4th 944, 952.)

58. *People v. Mesa* (2010) 186 Cal.App.4th 773, the Fourth Appellate District, Division 1, answered various sentencing questions posed by the defendant, who did not raise sufficiency issues. The defendant was convicted of two counts of assault after two separate incidents in which he shot and severely wounded two complete strangers, and jury also found true great bodily injury and personal firearm allegations with respect to both convictions. The trial court erred by imposing multiple gang enhancements, and a firearm use enhancement (§ 12022.5, subd. (a)), pursuant to section 1170.1, subdivisions (f), which prevented the trial court from imposing the gang enhancement on one of the convictions along with the firearm enhancement since both involved being armed with or the use of a dangerous or deadly weapon. (See *People v. Rodriguez* (2009) 47 Cal.4th 501, 509.) The matter was remanded for resentencing on the issue for the court to restructure the sentence. Under section 654, a felon's continuous possession of a single firearm does not permit multiple punishments for violations of section 12021, subdivision (a), that prohibits felons from possessing a firearm where the record showed that the defendant had continuous possession of the firearm. (See *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) This court sided with *People v. Herrera* (1999) 70 Cal.App.4th 1456, and *People v. Ferraez* (2003) 112 Cal.App.4th 925, and finds that section 654 did not prevent separate punishments for assault and for participation in a criminal street gang (§ 186.22, subd. (a)), because the criminal street gang statute punishes conduct and intentions that are separate from the conduct and intentions that give rise to culpability for assault with a firearm. The Court of Appeal acknowledges that *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310-1313, and *People v. Vu* (2006) 143 Cal.App.4th 1009, precludes sentencing the defendant for both the substantive offense of gang participation and for the underlying crime. Where a felon has possession of both a firearm and ammunition that is not in the firearm when they are seized, separate punishments may be imposed. The court distinguished *People v. Lopez* (2004) 119 Cal.App.4th 132, 137 which found that section 654 applies to this situation when the ammunition is found in the weapon.
59. *People v. Newton* (2010) 189 Cal.App.4th 314, the Second Appellate District, Division 6 held that an enhancement under Health and

Safety Code section 11370.2, subdivision (a), may be imposed in the current matter even when execution of sentence on the prior convictions were stayed under section 654 in the prior proceeding. In the current matter appellant was found guilty of two counts of sales under Health and Safety Code section 11352. Appellant had two priors that qualified under Health and Safety Code section 11370.2, subdivision (a), which the court found true in a bifurcated proceeding. The wording of Health and Safety Code section 11370.2, subdivision (a) requires an enhancement for a prior offense irrespective of whether a defendant served a prior prison term.

XI. EQUAL PROTECTION

1. *People v. Dial* (2004) 123 Cal.App.4th 1116, the Third Appellate District held that the delay in sentencing the defendant pending release from prison in another state did not deny him equal protection by precluding him from earning credit against California sentence for time served in the other state, whereas the defendant awaiting trial rather than sentencing would be entitled to be transferred to California following the demand or have charges dismissed pursuant to Interstate Agreement on Detainers. Defendants awaiting trial and those awaiting sentencing are not similarly situated, and if they were, different treatment would be justified by compelling government interest. Exemption of prisoners incarcerated outside state from 90-day limit for imposing sentence on incarcerated persons following request does not violate equal protection since out-of-state prisoners, whose presence might not be rapidly procured, are not similarly situated. Trial court was not required to grant defendant a speedy sentencing where defendant demanded same but was incarcerated outside state and would not waive right to be present.

XII. DOES THE RECORD ESTABLISH THAT THE PRIOR WAS A STRIKE IF IT CAN BE COMMITTED IN MULTIPLE WAYS

1. *People v. Watts* (2005) 138 Cal.App.4th 959, the Fifth Appellate District held that in a challenge to the prior, wherein the defendant had previously pleaded guilty to the prior offense, the court within the meaning of *People v. Cortez* (1999) 73 Cal.App.4th 276 and *People v. Rodriguez* (1998) 17 Cal.3d 253, held that on an appeal to challenge a finding that a prior conviction was a strike, where the prior conviction is for an offense which can be committed in more than one way, one or more of which would not qualify as a strike, and “if it cannot be determined from the record that the offense was committed in a way that would make it a strike, a reviewing court must presume the offense was not a strike. Here the prior offense was for a violation of section 12031, subd. (a)(2)(C), and for it to be a strike, it must be on the basis that the offense as committed constituted a felony violation of section 186.22. Pursuant to *People v. Robles* (2000) 23 Cal.4th 1106, section 12031, subd. (a)(2)(C), was reasonably susceptible to two interpretations. Under the “reasonable construction” which the *Robles* court rejected, the elements of section 12031, subd. (a)(2)(C) include only one of the elements of section 186.22, subd. (a), and as so construed, it cannot qualify as a strike. Since the prior was by way of a plea, the court remanded the matter to give the prosecution the opportunity to try the prior. (See *People v. Barrigan* (2004) 32 Cal.4th 238; *People v. Cortez*, *supra*, 73 Cal.App.4th at pp. 283-284.)

XIII. PROBATION ISSUES

A. DIRECT FILING ON A MINOR; PROBATION REPORT NEEDED

1. *People v. Garcia* (2004) 118 Cal.App.4th 987, the Fifth Appellate District held that the trial court is not required to receive in evidence, read, and consider a social study by the probation officer, within the meaning of section 1170.19, subd. (a)(4), prior to imposing an adult sentence on a minor against whom charges were directly filed under the discretion granted the district attorney by Proposition 21.

B. HARVEY WAIVER

1. *People v. Beagle* (2004) 125 Cal.App.4th 415, the Fifth Appellate District held that the rule expressed in *People v. Harvey* (1979) 25 Cal.3d 754, which prohibits the negative consideration at sentencing of dismissed charges, also applies to probation conditions. Here, the court erroneously added drug conditions of probation after a drug charge had been dismissed as part of a plea negotiation.
2. *People v. Munoz* (2007) 155 Cal.App.4th 160, the Third Appellate District held that where the defendant pleaded guilty to attempted murder and admitted possessing a firearm during commission of offense in exchange for dismissal of numerous other charges, and the court, in sentencing the defendant to the upper terms on the offenses, relied on defendant's voluntary *Harvey* waiver. (See *People v. Harvey* (1979) 25 Cal.3d 754.) The defendant stipulated to the truth of facts relevant to upper terms and allegations underlying the dismissed charges; as a result, the sentence did not violate defendant's Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt under *Cunningham*.
3. *People v. Linarez* REVIEW GRANTED; formerly at: (2007) 155 Cal.App.4th 1393, the Third Appellate District held that wherein the minor agreed to a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, wherein appellant stipulated that the court could consider his entire prior criminal history and factual background of this case, including any dismissed or stricken charges, the court found not *Cunningham* or *Black II* error.
4. *People v. Martin* REVIEW GRANTED: FORMERLY AT: (2009) 175 Cal.App.4th 1252, the Fourth Appellate District, Division 2 held that the trial court did not abuse its discretion in imposing probation conditions addressing domestic violence even though charges of corporal injury to a spouse had been dismissed, pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 [a court may not consider facts that pertain solely to a charge that has been dismissed as part of a plea bargain], as *Harvey* does not apply to probation conditions according to this court, which disagreed with the Fifth Appellate District and its opposite ruling in *People v. Beagle* (2004) 215 Cal.App.4th 415.

C. PROBATION ELIGIBILITY

1. *People v. Lewis* (2004) 120 Cal.App.4th 837, the Fourth Appellate District, Division One, held that the defendant was not ineligible for probation under section 1203, subd. (e)(3) and is not presumed ineligible for probation absent an explicit finding by the court that the defendant “willfully” inflicted great bodily injury, not those whose actions merely caused great bodily injury. The court also found that the trial court, and not the jury may make the factual determination necessary to determine if appellant is eligible for probation. (See *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1351.) A sentence of 25 years to life in prison for assaulting a child with force likely to cause great bodily injury and resulting in death does not constitute cruel and/or unusual punishment. (See *People v. Norman* (2003) 109 Cal.App.4th 221, 230.)
2. *People v. Sanghera* (2006) 139 Cal.App.4th 1567, the Third Appellate District found that the court did not abuse its discretion in denying probation where the defendant had to establish exceptional circumstances under rule 4.413(c). (See *People v. Serrato* (1988) 201 Cal.App.3d 761, 763.)

D. WOBBLER REDUCED TO A MISDEMEANOR; SECTION 17, SUBDIVISION (B); STRAIGHT FELONY CANNOT BE REDUCED

1. *People v. Gilbreth* (2007) 156 Cal.App.4th 53, the First Appellate District, Division 3, held that the defendant could not be convicted of crime of possession of firearm by convicted felon (§ 12021), where his predicate felony conviction had been reduced to a misdemeanor. Once a wobbler has been reduced to a misdemeanor, it is a misdemeanor for all times. (§ 17; *Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477; see also *People v. Banks* (1959) 53 Cal.2d 370, 383-387.)
2. *People v. Mauch* (2008) 163 Cal.App.4th 669, the Fourth Appellate District, Division 3 held that the offense of cultivation of marijuana (Health & Saf. Code § 11358), punishable “by imprisonment in state prison,” is a straight felony rather than a “wobbler;” therefore, it was error to reduce the offense to a misdemeanor under section 17, subdivision (b) as a part of appellant’s plea. Appellant is permitted

to withdraw his guilty plea. The legislature has the sole authority to determine whether an offense is a straight felony, a wobbler, a misdemeanor or an infraction. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

3. *People v. Love* (2008) 166 Cal.App.4th 1292, the Third Appellate District held that a defendant who ordered a gift card by means of a stolen credit card number “use[d]” the credit card within the meaning of section 484g, subdivision (a), and was thus guilty of a completed offense under that subdivision, even though the gift card went unissued after investigators informed the retailer that it was ordered with a stolen card. Pursuant to *People v. Garza* (2005) 35 Cal.4th 866, 881, appellant cannot be convicted for both using a stolen credit card to obtain property and for receiving the same item as stolen property (sec. 496). Finally, the failure of jury to make findings as to value of property obtained requires that convictions of grand theft and embezzlement be reduced to misdemeanors since the jury did not conclude that the value of the property was over \$400.
4. *People v. Barkley* (2008) 166 Cal.App.4th 1590, the Sixth Appellate District held that, the defendant suffered a prior “wobbler” conviction for assault was a “strike” wherein he was placed on probation with a jail term, and all of the orders made at the sentencing hearing, including orders regarding firearms and blood and saliva samples, were consistent with felony probation and inconsistent with the imposition of a misdemeanor jail sentence. The court distinguished *People v. Glee* (2000) 82 Cal.App.4th 99, where, when imposing sentence, the court placed appellant of summary probation. One can only receive summary probation for a misdemeanor.
5. *People v. Myers* (2009) 170 Cal.App.4th 512, the Second Appellate District, Division 6 held that where the trial court suspended imposition of sentence for the defendant’s conviction for possession of a controlled substance under Health and Safety Code section 11350, subdivision (a), and granted him Proposition 36 probation, the defendant’s conviction could not be reduced to a misdemeanor, even though defendant did not serve any prison time, because the statutory language of Health and Safety Code section 11055 does not authorize an alternative to imprisonment. In most situations, the

defendant's conviction is erased from the books, and he does not have to disclose it. However, for certain government job applications the fact of the conviction may have to be disclosed that he had a felony even though he successfully completed drug treatment probation, and as a result, he might suffer different consequences than one who has committed a misdemeanor does not constitute a denial of equal protection.

6. *People v. Feyrer* (2010) 48 Cal.4th 426, the California Supreme Court held that the trial court has the discretion to reduce a wobbler to a misdemeanor despite the defendant's admission of a great bodily injury enhancement (§ 12022.7, subd. (a)), that could attach to a later felony sentence, if imposed. The court initially suspended imposition of sentence and had placed appellant on probation. The trial court terminated probation, but would not reduce the matter to a misdemeanor. There is a major difference in placing appellant on probation without execution of sentence suspended (see *People v. Howard* (1997) 16 Cal.4th 1081; *People v. Wood* (1998) 62 Cal.App.4th 1262, 1265-1266 [cannot reduce a matter to a misdemeanor when sentence was executed and then suspended]), and imposition of sentence being suspended, where the court never sentenced appellant and had all of the sentencing options still open. (See *People v. Glee* (2000) 82 Cal.App.4th 99, 103; *People v. Kunkel* (1985) 176 Cal.App.3d 46, 55] [if the court declares the offense to be a misdemeanor, any enhancement applicable only to felonies, such as a 12022.7, is simply not imposed and ceases to have any significance].) When a defendant is convicted of a wobbler, and is granted probation without imposition of sentence, the offense is "deemed" a felony, unless subsequently reduced to a misdemeanor pursuant to section 17, subdivision (b).

E. ERRORS IN PROBATION REPORT

1. *People v. Eckley* (2004) 123 Cal.App.4th 1476, the Fifth Appellate District held that in denying probation and imposing a prison term, the court's reliance on a probation report, two psychological reports, and a letter from a prison administrator, some of which contained material, factual misstatements, necessitated a remand for a new probation and sentencing hearing. Such a hearing requires fundamental fairness (see *People v. Peterson* (1973) 9 Cal.3d 717), and the inaccurate statements deprived the defendant of that hearing, therefore, the matter had to be remanded for a new and fair hearing.

F. RESTITUTION PAYMENTS, PROBATION, ACQUITTED OF OFFENSE

1. *People v. Kleinman* (2004) 123 Cal.App.4th 1476, the Second Appellate District, Division 2 held that an order that convicted hit-and-run driver pay restitution, originally imposed as a condition of probation, remained in effect after probation was revoked and the defendant was sentenced to prison. The Court of Appeal held that the defendant was not permitted to be rewarded by virtue of his violation of probation.
2. *People v. Chun* (2007) 155 Cal.App.4th 170, the Third Appellate District held that where the defendant was convicted of street terrorism (§ 186.22), based on the shooting, and was properly ordered to pay restitution to all victims of that offense, including those against whom he was alleged to have committed other crimes of which he was acquitted. The court distinguished, somehow finding a difference without a difference, *People v. Percelle* (2005) 126 Cal.App.4th 164, 180-181 [a defendant should not pay restitution for a crime for which he was acquitted].
3. *People v. Guiffre* (2008) 167 Cal.App.4th 430, the Third Appellate District held that the court erred when it imposed a second restitution fine under section 1202.4, subdivision (b), after probation had been revoked, rather than a probation revocation fine under section 1202.44, after probation was revoked. (See *People v. Chambers* (1998) 65 Cal.App.4th 189, 822.)

4. *In re K.F.* (2009) 173 Cal.App.4th 655, the Sixth Appellate District held that objections to the sufficiency of the evidence used to justify specific items of restitution are deemed preserved for appeal. For restitution purposes, a letter from the health maintenance organization's (HMO's) agent to the victim, advising that the victim was indebted to the HMO for "billed charges" in a specified amount, constituted substantial evidence that these charges were "incurred" by the victim. "Explanation of Benefits" from HMO, listing a specified amount of "Ambulance Charges," did not constitute substantial evidence that victim incurred those charges where it bore the prominent legend, "This is not a bill"; showed zeroes in the column marked "Coinsurance/Copayment"; had no entry in column marked "Amount Paid"; and informed victim that "Your Obligation" was "0.00." Where victim continued to be paid by his employer while recovering from injuries only by depleting his sick leave, such depletion represented a loss to him and it was not error for court to order payment for period of sick leave as restitution. State disability payments to victim do not constitute a loss to victim, so it was error for court to include those amounts in its restitution order.

G. DIRECT RESTITUTION, A VICTIM OR NOT

1. *People v. Martinez* (2005) 36 Cal.4th 384, the California Supreme Court held that the court's order that the defendant reimburse the state agency for its costs of cleaning up a drug lab site, was unauthorized by the general restitution statute, section 1202.4, subd. (f), as the agency was not a "direct victim" of the defendant's criminal conduct. The exclusive statutory basis for reimbursement to the agency under those circumstances is Health and Safety Code sections 11470.1 and 11470.2, which establishes special procedures by which the agency may seek recovery.
2. *In re Tommy A.* (2005) 131 Cal.App.4th 1580, the Fourth Appellate District, Division 1 held that the payment by vehicle owner's insurance company for damages caused by the minor, who used the vehicle without the owner's permission did not come "directly from" the offender/minor within the meaning of Welfare and Institutions Code section 730.6, subd. (a)(1) [the victim must receive payment from the minor for the loss], so neither that payment nor victim's release of civil liability relieved the minor of the statutory obligation

to pay the restitution for the hit and run accident. The court distinguished *People v. Bernal* (2002) 101 Cal.App.4th 155, based on the statutory interpretation.

3. *People v. Rubics* (2006) 136 Cal.App.4th 452, the Fourth Appellate District, Division one held that do to the fact that involvement in an accident causing the death or injury is an element of the crime of felony hit-and-run (see Veh. Code § 20001, subd. (a)), the funeral expenses resulting from the accident are an element of restitution for which the defendant may be held responsible. The court's order that order that the defendant pay funeral expenses as an element of direct victim restitution was not an abuse of discretion where the defendant made an unsafe lane change, and the jury found this to be a cause of the accident. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1124 [applicable even though probation granted and not state prison as in this case].) This is in spite of the fact that the defense presented evidence, including expert opinion testimony, suggesting that the accident may have been caused by the victim's excessive speed and/or recent marijuana use.
4. *In re Dina V.* (2007) 151 Cal.App.4th 486, the First Appellate District, Division 4 held that restitution can be based on "either" replacement cost or the actual cost of repairing the property within the meaning of Welfare and Institutions Code section 730.6. (See *In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1391-1392.) In *People v. Yanez* (1995) 38 Cal.App.4th 1622, 1624-1625, the Fourth Appellate District, Division 2, held that restitution cannot be more than the loss to the property. The restitution is limited to the cost of repair or replacement value, which ever is less. This court failed to follow *Yanez*.
5. *People v. Giordano* (2007) 42 Cal.4th 644, the California Supreme Court, held that section 1202.4, governing direct victim restitution, authorizes a court to require a convicted defendant to compensate the spouse of a deceased victim for his or her future economic losses attributable to the deceased victim's death. In determining amount of restitution to spouse of the deceased victim for future economic losses, the court may consider such factors as the earning history of the deceased spouse, the age of the survivor and decedent, and the degree to which the decedent's income provided support to the

survivor's household as well as any factors relevant to the individual case and is not limited to amounts that would otherwise be recoverable from Restitution Fund. The court's method of calculating restitution, by averaging the decedent's annual earnings for the last three years of his life and multiplying by five, was imprecise, but did not amount to an abuse of discretion where the decedent had been the family's main support during the marriage, although the spouse had worked as a housekeeper for the last two years.

6. *People v. Short* (2008) 160 Cal.App.4th 899, the Third Appellate District held that where the defendant was convicted of driving under influence of alcohol and causing great bodily injury was driving his employer's vehicle in the scope of his employment at time crime occurred, and victim received funds from employer's insurer as settlement of a civil action against the defendant and employer because the defendant was covered by the terms of the employer's insurance policy, the settlement was deemed to be restitution directly from the defendant; therefore the court erred in denying the defendant's request to use settlement funds to offset victim restitution order in criminal action. (See *People v. Bernal* (2002) 101 Cal.App.4th 155, 165-168; see also *People v. Jennings* (2005) 128 Cal.App.4th 42, 53-57.)
7. *People v. Woods* (2008) 161 Cal.App.4th 1045, the First Appellate District, Division 1 held that the court erred in ordering the defendant to pay restitution to the family of a murder victim even though the defendant was only convicted as an accessory after the fact and given the fact he was sentenced to state prison, and since his "criminal conduct" did not result in economic loss. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247.) Had appellant been granted probation, the restitution could have been ordered. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)
8. *People v. Slattery* (2008) 167 Cal.App.4th 1091, the Third Appellate District held that the trial court erred when it ordered appellant, who pled no contest to one count of inflicting injury on an elder adult, to pay restitution to the hospital who treated victim because the hospital was not a direct victim of offense. (See *People v. Martinez* (2005) 36 Cal.4th 384 [re: who is a direct victim].) Additionally, appellant

did not forfeit claim by failing to object to restitution order at sentencing because defendant's claim fell within "unauthorized sentence" exception.

9. *People v. Bartell* (2009) 170 Cal.App.4th 1258, the Third Appellate District held that a bank is a direct victim, entitled to victim restitution, when a person forges checks drawn on that bank and bank absorbs the loss. Since the victim's account whose checks were forged was not debited (see *Cooper v. Union Bank* (1973) 9 Cal.3d 371, 377, fn. 5 [if the bank does debit the customer's account, the customer can compel the bank to recredit that account]), the bank was the only victim, and entitled to restitution. (See *People v. Crow* (1993) 6 Cal.4th 952, 957.)

H. DOES THE IMPOSITION OF A RESTITUTION FINE VIOLATE A DEFENDANT'S PLEA AGREEMENT IF NOT EXPRESSED IN THE AGREEMENT?

1. *People v. Crandell* (2007) 40 Cal.4th 1301, the California Supreme Court held that the court's imposition of a \$2,600 restitution fine, which was not stated by the prosecutor when he recited parties plea agreement, did not violate the negotiated disposition where the court, before taking defendant's plea, had accurately advised him he would "have to pay a restitution fund fine of a minimum of \$200, a maximum of \$10,000" and ascertained that prosecution had not made "any other promises" beyond that he would be sentenced to 13 years in prison. The court distinguished *People v. Walker* (1991) 54 Cal.3d 1013, where it was not mentioned in the negotiations nor before taking the plea, like it was, by the court, in this case.
2. *People v. Villalobos* REVIEW GRANTED (S176574); formerly at: (2009) 177 Cal.App.4th 82, the Fifth Appellate District held that the trial court erred in failing to admonish the defendant of the statutory minimum and maximum of the restitution fine as a consequence of his plea, but such claim of error was forfeited when defendant failed to object before sentencing where the record indicated an absence of any bargaining or agreement on any terms regarding fines, restitution fines were left within trial court's discretion. The court distinguished *People v. Walker* (1991) 54 Cal.3d 1013, where it was not mentioned in the negotiations or before taking the plea, and

followed *People v. Crandell* (2007) 40 Cal.4th 1301 where it left the restitution fine to the court's discretion.

I. AGGREGATION OF RESTITUTION FINE PER CASE, NOT PER SENTENCING AND COURT SECURITY FEE ISSUES

1. *People v. Schoeb* (2005) 132 Cal.App.4th 861, the Third Appellate District held that it was not error to impose multiple restitution fines (see § 1202.4, subd. (b)), where there are multiple “cases” that were not consolidated, even though the defendant was sentenced in one proceeding. (See *People v. Enos* (2005) 128 Cal.App.4th 1046.) The Court of Appeal additionally found that where a defendant is convicted in multiple cases, some of which involved multiple counts, trial court was required to impose a separate court security fee (see § 1465.8) for each count rather than merely one fee for each case.
2. *People v. Soria* (2010) 48 Cal.4th 58, the California Supreme Court held that if cases are not formally consolidated and separate pleas are entered in separately charged cases, "every case," as stated in sections 1202.4 and 1202.45, plainly means that each case filed against a defendant, even if those separately filed cases are disposed of at a single hearing under a plea bargain.

J. EXTENSION REVOCATION OF THE PROBATIONARY PERIOD

1. *People v. Jackson* (2005) 134 Cal.App.4th 929, the Second Appellate District, Division 8 held that it is clear that section 1203.2, subd. (e) permits the extension of the probationary period in excess of the original maximum length where the court finds the defendant in violation of probation, formally revokes probation prior to the expiration of the probationary period, and sets aside the revocation. (See *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1266-1267.) However, the court must find that the defendant has the ability to pay and willfully failed to do so, or the order violates due process. (*Ibid.*) Or, at a minimum, the court must indicate on the record that it considered whether the defendant was able to pay the restitution and whether he or she willfully failed to pay. Here, there is no such finding by the court, and the court would have had to extend probation for another 13 years to pay off the amount at the rate determined the defendant was able to pay. The court found that the remaining debt be converted to a civil judgment, and that probation is terminated.

2. *People v. Williams* (2007) 156 Cal.App.4th 898, the Fourth Appellate District, Division 1 held that where appellant/probationer entered a negotiated plea, pursuant to a specific sentence on his new case and to a midterm consecutive sentence in the case in which he was placed on probation, trial court had jurisdiction to impose the negotiated sentence notwithstanding pendency of defendant's appeal in the earlier case (*People v. Cunningham* (2001) 25 Cal.3d 926, 1044 [a unauthorized sentence can be corrected at any time]), and here a sentence which would be unauthorized can be fixed prior to it becoming unauthorized. Furthermore, the 120-day time limit under section 1170, subd. (d) for recalling and modifying the original sentence of probation is inapplicable. Pursuant to *People v. Mendez* (1999) 19 Cal.4th 1084, 1094, and *People v. Panizzon* (1996) 13 Cal.4th 68, 74, the appellate court had no jurisdiction to entertain appellant's claim of sentencing error where the allegedly erroneous application of sentencing rules was based on a negotiated plea and defendant failed to obtain a certificate of probable cause from trial court on a certificate issue. (*People v. Mendez, supra*, 19 Cal.4th at p. 1088 [certificate of probable cause requirement is limited to "certificate" issues].) "Noncertificate" issues, which do not require

a certificate of probable cause, include postplea matters that do not challenge the validity of the plea, including attacks on the court's discretionary sentencing choices left open by the plea agreement. (*Ibid.*)

3. *People v. Mendoza* (2009) 171 Cal.App.4th 1142, the Sixth Appellate District held that the trial court does not have authority, while a defendant is still on probation, to reduce a county jail term imposed as a condition of probation, when the defendant has already served the term. A court can modify a term of probation with a showing of a change of circumstances. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1093-1095.)

K. PROBATION REVOCATION PROCEEDINGS

1. *People v. Shepherd* (2007) 151 Cal.App.4th 1193, the First Appellate District, Division 3 held that the hearsay testimony by a probation officer at the probation revocation hearing to the effect that substance abuse program official told the witness that the defendant had been asked to leave program after testing positive for alcohol was erroneously admitted (see *People v. Arreola* (1994) 7 Cal.4th 1144, 1148-1152; see also *People v. Winson* (1981) 29 Cal.3d 711), even under more lenient standard of admissibility applicable at such hearings (see *People v. Maki* (1985) 39 Cal.3d 707), where no justification was offered for declarant's absence, no other evidence corroborated her statements, it was unclear from the testimony whether declarant observed the alleged violation or was simply reporting what she had been told by other unidentified persons at the program, and defendant denied having consumed alcohol while in the program.
2. *People v. Stanphill* (2009) 170 Cal.App.4th 61, the Third Appellate District held that the Sixth Amendment confrontation clause does not apply in probation revocation proceedings as it only applies in criminal prosecutions, and a probation revocation hearing is not a criminal prosecution. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441, 445, 447.)
3. *People v. Cervantes* (2009) 175 Cal.App.4th 291, the Second Appellate District, Division 6, held that where the trial court was aware that the defendant was an undocumented alien when it granted

probation, and then he was unable to appear for a 30-day review hearing because he was in the custody of immigration authorities, the trial court erred in finding the defendant in violation of probation. A court may not revoke probation unless the evidence supports a conclusion that the probationer's conduct constituted a willful violation of the terms and conditions of probation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.)

4. *People v. Black* (2009) 176 Cal.App.4th 145, the Fourth Appellate District, Division 2 held that the court when considering sentence after probation had been granted, violated, reinstated, and then violated again, can consider the conduct on probation from the original grant of probation and the previous reinstatement of probation in determining what sentence should be imposed, and is not limited to the conduct at the time of the original grant of probation under California Rules of Court, Rule 4.435(b)(1). (See *People v. Harris* (1990) 226 Cal.App.3d 131, 143-144; distinguished from *People v. Colley* (1980) 113 Cal.App.3d 870.)
5. *People v. Burton* (2009) 177 Cal.App.4th 194, the First Appellate District, Division 4 held that once expiration of a probation period is tolled, then as long as a probationer is found to have committed some probation violation during the probation period, as charged in a petition filed during that probation period, a trial court retains jurisdiction to revoke probation after expiration of the probation term even if tolling was based on a violation that was ultimately unproven.
6. *People v. Landon* (2010) 183 Cal.App.4th 1096, reported on April 14, 2010, in 2010 Los Angeles Daily Journal 5459, the First Appellate District, Division 2 held where the trial court was presented with overwhelming evidence that the defendant's conduct while on probation was unsatisfactory, and the court declined to grant probation after she pleaded guilty to driving under the influence, she could not establish prejudice from any alleged sentencing errors since she gave the court no reason to believe that she would comply with the conditions of her probation in the future. This court declined to say that the probation hearing was unreliable, and therefore a violation of due process. (See *People v. Peterson* (1973) 9 Cal.3d 717, 726 [the procedural safeguards for a probation

do not have to be the same as a trial on guilt, but they cannot be fundamentally unfair].) The hearing must also be reliable and cannot be based on unreliable information. (See *People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755; *People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.)

L. PROBATION DENIAL UNDER SECTION 1203.066

1. *People v. Wills* (2008) 160 Cal.App.4th 728, the Fourth Appellate District, Division 1 held that where a defendant was convicted of child molestation under section 288, subd. (a), and was found under section 1203.066, subd. (a)(8) to have engaged in substantial sexual contact with a victim under 14, rendering him presumptively ineligible for probation unless he met “all” criteria specified in section 1203.066, subd. (c), including the requirement that probation be in best interests of victimized “child,” the court had no authority to grant probation because the victim was no longer a child at time of sentencing, and court did not err to extent it denied probation without expressly considering whether probation would have been in victim’s best interests at time of molestation.

M. DEFERRED ENTRY OF JUDGMENT SECTION 1000

1. *People v. Kirk* (2006) 141 Cal.App.4th 715, the Fourth Appellate District, Division 3, held that a guilty plea, even if sentence has not been imposed, constitutes a prior conviction for purposes of diversion, or deferred entry of judgment, within the meaning of section 1000, subd. (a)(1), which precludes a grant of drug diversion to a defendant previously convicted of a drug offense.
2. *People v. Ochoa* (2009) 175 Cal.App.4th 859, the Third Appellate District held that the trial court erred in finding that the defendant’s conviction for possessing less than an ounce of marijuana (Health and Saf. Code § 11357, subd. (b), more than two years prior to the current offense of possession of cocaine and being under the influence, rendered him ineligible for deferred entry of judgment under section 1000, since the marijuana conviction “washes out” or is a nullity after the two year period. Therefore, appellant is eligible for probation under section 1000, deferred entry of judgment.

N. PROTECTIVE ORDER IMPROPER BUT STAY AWAY ORDER AS A CONDITION OF PROBATION IS VALID

1. *People v. Selga* (2008) 162 Cal.App.4th 113, the Third Appellate District held that where the defendant pled guilty to stalking Christina Reyes, his ex-girl friend and mother of his child, the court erroneously imposed a criminal protective order under section 1203.097, subdivision (a)(2) for her current boyfriend, but a requirement that defendant stay away from him, may be imposed as a general condition of probation under section 1203.1.

O. NEW PROBATION REPORT ISSUES

1. *People v. Conners* (2008) 168 Cal.App.4th 443, the Second Appellate District, Division 8 held that the trial court erred in failing to grant a continuance and in sentencing appellant without a new probation report, essentially rendering the sentencing hearing fundamentally unfair. (*People v. Leffel* (1987) 196 Cal.App.3d 1310, 1318-1319.)

P. DOMESTIC VIOLENCE COUNSELING IS MANDATED AND IS NOT DISCRETIONARY WHEN SECTION 1203.097 IS REQUIRED

1. *People v. Cates* (2009) 170 Cal.App.4th 545, the First Appellate District, Division 5, held that the court erred in failing to order appellant attend a domestic violence program, which was mandated for the assault on his former girlfriend, under section 1203.097. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1163.) Where trial court failed to impose mandatory condition of probation at time of sentencing, it was required to do so upon the error being called to its attention, even in the absence of a subsequent probation violation.

Q. THE COURT CAN IMPOSE PROBATION RESTRICTIONS ON A DEFENDANT'S USE OF MEDICAL MARIJUANA

1. *People v. Brooks* (2010) 182 Cal.App.4th 1348, the Second Appellate District, Division 6 held that the trial court did not abuse its discretion to impose a probation condition prohibiting probationer from using medical marijuana, even though probationer had a

doctor's recommendation for it. The probation condition related to probationer's offense for possession of a controlled substance for sale, and to petitioner's potential for future criminality. Barring probationer from using marijuana did not constitute deliberate indifference to his medical needs. (*Estelle v. Gamble* (1976) 429 U.S. 97, 107 ["deliberate indifference" by prison officials to an inmates medical needs could raise constitutional claims].)

XIV. PLEA BARGAIN CONTRACTS

A. PLEA BARGAIN AS A CONTRACT

1. *People v. Toscano* (2004) 124 Cal.App.4th 340, the Second Appellate District, Division 1, held that where the defendant entered into a plea agreement allowing him to file a motion to dismiss a second-strike allegation, without limitation as to the grounds upon which the motion could be based, the trial court erred where it failed to consider the merits of the motion to strike, where it was based on the ground that the defendant did not knowingly plead guilty to the prior. The Court of Appeal found that a plea bargain is interpreted according to the same rules as other contracts. (*Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1159.) Therefore, the defendant was entitled to a new hearing on that motion.
2. *People v. Chatmon* (2005) 129 Cal.App.4th 771, the First Appellate District, Division Three, held that where the defendant, pursuant to a plea bargain, pleaded guilty to possession of cocaine, and received the benefit of probation and a dismissal of a resisting arrest (§ 148) count. Had appellant been convicted of resisting, he which would have disqualified him from treatment under Proposition 36. Appellant was not entitled to relief from a subsequent probation revocation since he was not sentenced under Proposition 36, but got the benefit of his bargain, even if the court acted in excess of its jurisdiction, so long as it had fundamental jurisdiction to sentence appellant. Having received the benefit of his bargain, appellant cannot now trifle with the courts. (See *People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-1057; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123.)

3. *People v. Jordan* (2006) 141 Cal.App.4th 309, the Sixth Appellate District held that the court erred in staying the second of two five-year serious felony enhancements within the meaning of section 667, subd. (a)(1). Even though the defendant failed to object to the “sentence structure” when it was announced, the court, on remand, must restructure the sentence where the defendant did not agree in a plea bargain to condition his waiver of jury trial on court staying sentence enhancement. (See *People v. Buttram* (2003) 30 Cal.4th 773, 789 [defendant had the right to argue for an appropriate individualized sentence within the constraints of the bargain, and as a result, he maintained his right to challenge the court’s exercise or lack thereof, of that discretion.].)

B. DOES THE PRINCIPAL TERM HAVE TO BE THE LONGEST TERM OF THE CURRENT CONVICTIONS WHEN THE PLEA BARGAIN SETS A RANGE FOR THE JUDGES DISCRETION?

1. *People v. Miller* (2006) 145 Cal.App.4th 206, the Sixth Appellate District held that where the plea agreement provided for an aggregate sentence not exceeding six years eight months in prison and further provided that court could consider a six-year sentence, the court did not have to elect the longest term available from the three current convictions to be designated as the principal term. The defendant appealed was based on the contention that the court erroneously concluded that it lacked the discretion to not impose the longest principal term available to it within the meaning of section 1170.1, subd. (a). *People v. Felix* (2000) 22 Cal.4th 651 and *People v. Scott* (1993) 17 Cal.App.4th 1383 do not apply to this plea bargain issue where the parties have given the court the discretion to sentence within a 6 month period. This appeal is not an attack on the validity of the plea and thus did not require a certificate of probable cause. When the court consolidated sentencing in three different cases, it had the discretion to select any of the three terms as the principal term; therefore, the court’s conclusion that it had to select the longest term as the principal term, resulting in maximum sentence allowed by plea bargain, was erroneous.

3. NEED OBJECTION RE ADVICE TO STRIKE AN ENHANCEMENT RE: CONSEQUENCES OF PLEA

1. *People v. Jones* (2009) 178 Cal.App.4th 853, the Fourth Appellate District, Division 2 held that unless there is an objection at or prior to sentencing, the defendant waived his right to be specifically advised of the direct consequences of admitting a prior conviction, including a strike. (See *People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

XIV. SECTION 1203.4

1. *People v. Arata* (2007) 151 Cal.App.4th 778, the Third Appellate District held that the statute prohibiting the court from expunging, pursuant to section 1203.4, a conviction for a violent sexual offense under section 288, subd. (a), violates due process as applied to a defendant who was convicted prior to statute's enactment and who entered into plea agreement in reliance on the relief available under section 1203.4. (See *INS v. St. Cyr* (2001) 533 U.S. 289 [150 L.Ed. 347].) Additionally, not all parts of plea bargains need to be expressed; plea bargain terms can be implied. (See *People v. Harvey* (1979) 25 Cal.3d 754, 758.) Section 1202.4 relief is part of the bargain made with a probationer. (*People v. Johnson* (1955) 134 Cal.App.2d 140, 143.) Since the de's plea rested in a significant degree on the promise of an eventual section 1203.4 relief, such promise must be fulfilled. (*Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed. 427, 433].)
2. *People v. Mgebrov* (2008) 166 Cal.App.4th 579, the First Appellate District, Division 2 held that section 1203.4, subdivision (a), which provides for the setting aside of certain convictions, permits the setting aside of convictions on individual counts that were tried together in cases where the defendant is not entitled to relief as to the entire case.

XV. PROPOSITION 36

1. *People v. Wandick* (2004) 115 Cal.App.4th 131, the Third Appellate District held that Proposition 36 probation was not available to nonviolent drug offender who was convicted and sentenced to two years in prison for grand theft after conviction, but before sentencing, on drug charge. (See also *People v. Esparza* (2003) 107 Cal.App.4th 691 [it was not error to impose “sentence” on appellant for violating probation in a non-drug case when the violation is a new conviction for a drug possession felony. Furthermore, since appellant would be unavailable for Proposition 36 drug treatment in prison, he may also be sentenced to prison on the drug charge].)
2. *People v. Ferrando* (2004) 115 Cal.App.4th 917, the Third Appellate District, held that the defendant was not eligible for the treatment of Proposition 36 following a conviction for “opening” or “maintaining” a place for sale of methamphetamine, within the meaning of Health and Safety Code section 11366. The court concluded that any non-violent drug offense of a commercial nature, did not qualify for Proposition 36 treatment.
3. *People v. Orabuena* (2004) 116 Cal.App.4th 84, the Sixth Appellate District distinguished *In re Varnell* (2003) 30 Cal.4th 1132, wherein the California Supreme Court held that section 1385 does not permit the trial court to dismiss a prior conviction and to disregard sentencing factors that are not themselves required to be a charge or allegation in an indictment or information. Here, prior to the defendant pleading guilty to the possession of drug offenses, the defendant had plead guilty to driving on a suspended or revoked license, even though the offenses arouse at the same time. The Court of Appeal found that the court could dismiss the Vehicle Code violation under section 1385, and such was permissible as the defendant had not been “sentenced,” he had merely served the 30 days in jail as a condition of probation. Therefore, the matter is reversed and the lower court was ordered to determine if it wants to exercise its discretion to strike the misdemeanor convictions that make the defendant ineligible for Proposition 36 treatment.
4. *Moore v. Superior Court* (2004) 117 Cal.App.4th 401, the Third Appellate District held that the five-year “washout” period under

section 1210.1, subd. (b)(1) of Proposition 36 begins when the disqualifying felony is committed, not when conviction takes place, when the defendant is placed on probation. If he is sentenced to state prison, it is when he is released from that institution.

5. *People v. Dagostino* (2004) 117 Cal.App.4th 974, the Fifth Appellate District held that the defendant's failure to meet with the mental health "gatekeeper," whose job it was to evaluate his circumstances and determine the requisite drug treatment level, constituted violation of a "drug related" condition of Proposition 36 probation. As a result, the court could not revoke probation absent two prior violations or a finding of dangerousness. Imposition of local jail time as sanction for first violation of probation could not be challenged as part of appeal from order imposing sanctions for second violation. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) However, the trial court may not on remand, following the reversal of an order erroneously revoking Proposition 36 probation, impose local jail time as a condition of reinstated probation.
6. *People v. Canty* (2004) 32 Cal.4th 1266, the California Supreme Court held that a defendant is ineligible for drug treatment under Proposition 36 because driving under the influence of drugs is not simple possession or use of drugs, and is not drug related. The court does discuss *People v. Duncan* (1990) 216 Cal.App.3d 1621, wherein the defendant was denied drug diversion because the driving under the influence offense was a drug related offense, and distinguish it based on the statutory schemes of Proposition 36 and section 1000 diversion.
7. *People v. Campbell* (2004) 119 Cal.App.4th 1279, the First Appellate District, Division 2, held that Proposition 36 does not permit the court, after determining that residential treatment is appropriate, following a second violation of probation, to allow the defendant to enter an outpatient treatment program in exchange for the defendant's stipulation to upper prison term in event probation is later revoked. A defendant who is on probation pursuant to Proposition 36 can only have that probation revoked in accordance with the statutory scheme. (*In re Mehdizadeh* (2003) 105 Cal.App.4th 995, 1006; see also *People v. Davies* (2003) 104 Cal.App.4th 1443, 1448 [sanction limited to the provision of section

1210].) The trial court, upon revoking probation and sentencing defendant to the upper term, could not legally rely upon the invalid stipulation and was required to specify reasons for the upper term. (See § 1170, subd. (b); rule 4.433 (c)(1).)

8. *In re Ogea* (2004) 121 Cal.App.4th 974, the Fourth Appellate District, Division 3, held that possession of a controlled substance while armed with a loaded, operable firearm, as proscribed by Health and Safety Code section 11370.1, subd. (a), is not a “nonviolent drug possession offense” that would entitle defendant to treatment under Proposition 36.
9. *People v. Dove* (2004) 124 Cal.App.4th 1, the Fourth Appellate District, Division 2 held that, the factual finding that a defendant did not possess or transport a controlled substance for personal use, for purposes of Proposition 36 sentencing, may be made by the trial court under a preponderance of the evidence standard.
10. *People v. Eribarne* (2004) 124 Cal.App.4th 1463, the Fifth Appellate District held that a conviction for driving with a blood-alcohol level of 0.08 percent or higher in violation of Vehicle Code section 23152, subd. (b) is a “misdemeanor conviction involving . . . the threat of physical injury to another person” within the meaning of section 1210.1, subd. (b)(1), which provides that persons previously convicted of one or more serious or violent felonies who have sustained such a misdemeanor conviction within a period of five years prior to committing a nonviolent drug possession offense are not eligible for probation and diversion into a drug treatment program under Proposition 36.
11. *People v. Bowen* (2004) 125 Cal.App.4th 101, the Third Appellate District held that in determining the number of drug offender’s past probation violations for purpose of ascertaining his continuing eligibility for treatment under Proposition 36, the court properly counted pre-Proposition 36 violations, including cases where probation was revoked and jail time imposed.
12. *People v. Hinkel* (2005) 125 Cal.App.4th 845, the Third Appellate District held that the trial court’s denial of the petition to set aside the defendant’s drug conviction and terminate probation under

Proposition 36 was not an abuse of discretion where the defendant completed a treatment program, after being in two different programs, but the evidence regarding the nature of the program and of the defendant's performance in it was inadequate to establish reasonable cause to believe that he "successfully completed the program" or that he would remain drug-free. (See § 1210, subd. (c).)

13. *People v. Thurman* (2005) 125 Cal.App.4th 1453, the Third Appellate District held that in a Proposition 36 matter, the court may impose, as a condition of probation, that the defendant waive his statutory right to custody credits for time he spent in a residential drug treatment facility. If the defendant did not like this option, he could decline probation if the terms are not to his liking. (See *People v. Kendrick* (2004) 122 Cal.App.4th 1305, 1311.) All in all, incarceration is still not an initial option within the limits of Proposition 36. (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1446.)
14. *People v. Foreman* (2005) 126 Cal.App.4th 338, Division Three held that forging or presenting a forged prescription to obtain drugs in violation of Health and Safety Code section 11368 is not a possessory drug offense for which the defendant is entitled to treatment under Proposition 36. This court believes that only offenses that come within the clear meaning of the statute, those being for personal use, possession for personal use, or transportation for personal use of the controlled substance; nothing else. (See *In re Ogea* (2004) 121 Cal.App.4th 974, 982.)
15. *People v. Guzman* (2005) 35 Cal.4th 577, the California Supreme Court held that Proposition 36 does not violate appellant's right of equal protection under either the federal or state constitutions by failing to require that appellant be granted probation when the current offense was a non-violent drug possession offense while on probation for offenses other than non-violent drug possession offenses.
16. *People v. Wheeler* (2005) 127 Cal.App.4th 873, the Third Appellate District held that forging a prescription in violation of Health and Safety Code section 11368, does not meet the statutory definition of

a “nonviolent drug possession offense” as required for treatment under Proposition 36.

17. *People v. Martinez* (2005) 127 Cal.App.4th 1156, the Second Appellate District, Division 8 held that the defendant’s proposition 36 probation may be revoked for a check forgery violation, since that is not a drug possession offense. (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1398 [the probation violation must be drug-related to apply § 1210.1, subd. (f)].)
18. *People v. Tanner* (2005) 129 Cal.App.4th 223, the Fourth Appellate District, Division 1, held that the provisions of Proposition 36, which limits the circumstances under which such probation may be revoked, requires the prosecution to bring three noticed motions to revoke the defendant’s probation before the court may revoke it based exclusively on drug-related violations. The legislation calls for giving the defendant two chances, before the third motion is brought by the prosecution to terminate probation. (See *People v. Johnson* (2003) 114 Cal.App.4th 284, 295.)
19. *People v. Chatmon* (2005) 129 Cal.App.4th 771, the First Appellate District, Division Three, held that where the defendant, pursuant to a plea bargain, pleaded guilty to possession of cocaine, and received the benefit of probation and a dismissal of a resisting arrest (§ 148) count. Had appellant been convicted of resisting, he which would have disqualified him from treatment under Proposition 36. Appellant was not entitled to relief from a subsequent probation revocation since he was not sentenced under Proposition 36, but got the benefit of his bargain, even if the court acted in excess of its jurisdiction, so long as it had fundamental jurisdiction to sentence appellant. Having received the benefit of his bargain, appellant cannot now trifle with the courts. (See *People v. Couch* (1996) 48 Cal.App.4th 1053, 1056-1057; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123.)
20. *People v. Moniz* (2006) 129 Cal.App.4th 421, the Third Appellate District held that a conviction for concealing or destroying evidence, including drugs or drug related paraphernalia, is not a misdemeanor related to use of drugs for purposes of Proposition 36 treatment. (See also *People v. Wheeler* (2005) 127 Cal.App.4th 873; *People v.*

Foreman (2005) 126 Cal.App.4th 338, 343; *In re Ogea* (2004) 121 Cal.App.4th 974, 985-987.)

21. *People v. Budwiser* (2006) 140 Cal.App.4th 105, the Third Appellate District held that the defendant's procedural rights, and due process rights, pursuant to Proposition 36, were not violated where the court conducted a single hearing on two separate petitions to revoke probation. There was substantial evidence to support the finding that the defendant was unamenable to drug dependency treatment in order to support the revocation. The evidence established that the defendant was removed from the treatment program for three positive tests and one failure to test, and defendant was subsequently found with a device designed to circumvent urine test.
22. *People v. Hartley* (2007) 156 Cal.App.4th 589, the Third Appellate District held that the lower court erred in denying appellant's petition to dismiss the matter wherein appellant had successfully completed the Proposition 36 program. (See § 12220.1, subd. (d)(1).) The Court of Appeal found that the probation department could make the application for appellant, and it did not have to come from appellant or counsel. Even though the court's literal reading of the statute may be correct, the "plain meaning" rule does not prohibit a court from determining whether the literal meaning of the statute comports with its purpose. The words of the statute must be read in context, and must be harmonized with other sections. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) The same rule applies to voter initiatives. (*Ibid.*)
23. *People v. Hazle* (2007) 157 Cal.App.4th 567, the Third Appellate District held that where the defendant on Proposition 36 probation was the subject of three revocation petitions, and the second and third petitions were tried together, but the facts supporting the third petition took place before the second petition was filed, the sustaining of the petitions did not render defendant ineligible to be continued on probation. (See *People v. Tanner* (2005) 129 Cal.App.4th 223.) Proposition 36 entitles an eligible defendant to three distinct periods of probation before he can be found ineligible based solely on drug-related violations. This court distinguishes

People v. Budwiser (2006) 140 Cal.App.4th 105 where the violations were not in the same order as they were in this case.

24. *People v. Enriquez* (2008) 160 Cal.App.4th 230, the Third Appellate District held that where the defendant was on Proposition 36 probation and was subject of three separate unadjudicated petitions to revoke probation, all for reasons related to simple possession or use of drugs, the court was required to treat the petitions as a single petition and to continue the defendant on probation absent a finding that he was a danger to others. (See *People v. Hazle* (2007) 157 Cal.App.4th 567.)
25. *People v. Castagne* (2008) 166 Cal.App.4th 727, the First Appellate District, Division 2 held that the trial court erred in finding that the defendant's concurrent treatment for two offenses constituted "two separate courses of drug treatment" and rendered defendant ineligible for further Proposition 36 drug treatment under section 1210.1, subdivision (b)(5). The defendant's history of probation violations, including violations of drug treatment conditions, did not compel the appellate court to find that defendant had refused drug treatment and was thus ineligible for Proposition 36 treatment under section 1210.1(b)(4) where trial court did not make such a finding, and conflicting inferences from the record could support a contrary finding. The matter is remanded for the court to make the appropriate findings.
26. *People v. Harris* (2009) 171 Cal.App.4th 1488, the Fourth Appellate District, Division 1 held that the court erred in sentencing appellant to state prison, rather than granting Proposition 36 probation, despite his abysmal prior record, which included 7 prior prison terms, and 3 prior enhancements for Health and Safety Code section 11370.2, subdivision (a). Appellant was convicted, in this current offense, with a violation of transportation of cocaine base. However, the jury found that the transportation was for personal use. As a result, the prison sentence was unauthorized, and there could be no waiver, since the court was required to place appellant on Proposition 36 probation.
27. *People v. Sizemore* (2009) 175 Cal.App.4th 864, the Second Appellate District, Division 3 held that the trial court did not err in

removing the defendant from Proposition 36 diversion program where defendant failed to comply with terms of the diversion program and expressed a desire to “opt out” of the program (see *People v. Campbell* (2004) 119 Cal.App.4th 1279), and serve “regular” probation. Defense counsel was not deficient for acquiescing to the defendant’s request after the trial court indicated it believed the defendant was unamenable to Proposition 36 treatment. Furthermore, the defendant did not suffer prejudice as a result of counsel’s performance. As defendant failed at every attempt at probation, trial court did not abuse its discretion in sentencing defendant to state prison. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 910.)

28. *People v. Haddad* (2009) 176 Cal.App.4th 270, the Second Appellate District, Division 5 held that the defendant's admitted use of a device to produce a negative result during court-ordered drug testing, the whizanator, was not a drug-related violation of probation for purposes of Proposition 36 (§ 1210.1).
29. *People v. Friedeck* (2010) 183 Cal.App.4th 892, the Second Appellate District, Division 6 held that the defendant's implied refusal of drug treatment as a condition of deferred entry of judgment (§ 1000, subd. (a)(1)), rendered him ineligible for probation under Proposition 36. (§ 1210.1) (See also *People v. Strong* (2006) 138 Cal.App.4th Supp. 1, 5-6.) Merely because the defendant attended some AIDS classes was no substitute for not attending drug classes, even if he lost his paperwork.

XVI. ONE STRIKE LAW SECTION 667.61

1. *People v. Benitez* (2005) 127 Cal.App.4th 1274, the Third Appellate District held that under “one-strike” provision (§ 667.61), requiring imposition of 15-year-to-life sentence if defendant is convicted of child molestation involving multiple victims (§ 667.61, subd. (e)(5)), unless defendant is qualified for probation pursuant to section 1203.066, subd. (c), the question of whether the defendant is qualified for probation is to be made by judge rather than by jury. Since the granting of probation is an act of clemency and not a form of punishment (see *People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 287, 293-295), the sentence was not increased, and therefore, there was no *Blakely* violation.
2. *People v. Chan* (2005) 128 Cal.App.4th 408, the Second Appellate District, Division 5 held that where the evidence established that the defendant was found by police at a location other than that listed on his sex offender registration, which was non-existent; that the defendant knew he had a duty to register as a sex offender; that the defendant told the police that he lived at the location where he was found; and that the defendant in fact lived at a location which was neither the one at which he was found nor the one listed on his registration, was sufficient for the jury to find that he violated section 290. The jury was not precluded from finding that the defendant’s act was wilful, in spite of his testimony that he mistakenly listed the wrong address, that he meant to use the correct address, and that he did not tell the officer he lived at the location where he was found. (See *People v. Garcia* (2001) 25 Cal.4th 744, 751-752 [the defendant must willfully violate the statute]; *People v. Edgar* (2002) 104 Cal.App.4th 210, 220-221 [defendant must actually know that staying at a different residence required an additional registration].) The corpus delicti rule (see *People v. Alvarez* (2002) 27 Cal.4th 1161, 1170), does not extend to statements which constitute the commission of the charged crime. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 394.) As a result, the rule does not preclude the defendant’s conviction, based on his own false written entries on state’s registration form, which he admitted filling out. The defendant cannot be convicted of violating section 288, subd. (b)(1), lewd conduct by force, and section 288, subd. (a), lewd conduct without force, where the same conduct make up both offenses, as the section 288, subd. (a) is a lesser included offense to the section 288, subd. (b)(1) offense. (See *People v. Ortega* (1998)

19 Cal.4th 686, 692, 693 [cannot be convicted of the lesser included offense and the greater offense].) Where the defendant was previously convicted of section 288, subd. (a), and where he is currently convicted of multiple violations of section 288, subd. (b)(1), the court was required by the One-Strike Law (see § 667.61) to impose consecutive sentences of 25 years to life for each violation of section 288, subd. (b)(1). It had the option of striking the prior in the interests of justice (*People v. Jordan* (1986) 42 Cal.3d 308, 319, fn. 7; *People v. Bradley* (1998) 64 Cal.App.4th 386, 400, fn. 5), and since that was not considered it must be remanded for resentencing.

3. *People v. Rodriguez* (2005) 129 Cal.App.4th 1401, the Fourth Appellate District, Division 2, held that the trial court erred when it believed that it did not have the discretion to impose concurrent terms for multiple convictions under the one strike law within the meaning of section 667.61.
4. *People v. Fuller* (2006) 135 Cal.App.4th 1336, the Second Appellate District, Division 1 held that multiple rapes all committed against the same victim within an hour and within her apartment, albeit in different rooms, occurred “during a single occasion” under the “one strike” law (§ 667.61) punishing forcible sex crimes. The “single occasion” rule is different when applying section 667.61 and not section 667.6. (See *People v. Jones* (2001) 25 Cal.4th 98.) Where the defendant was convicted on multiple counts of rape, and all of the crimes were committed “during a single occasion” within the meaning of the one strike law, the defendant was subject to a single enhanced sentence on one count for the sex acts (see *People v. Wutzke* (2002) 28 Cal.4th 923, 929-930; *People v. Mancebo* (2002) 27 Cal.4th 735, 741-742), and to separate, determinate sentences on the other non-sex counts. (See *People v. Acosta* (2002) 29 Cal.4th 105, 118-128.)
5. *People v. Hiscox* (2006) 136 Cal.App.4th 253, the First Appellate District, Division 3 held that where the defendant was charged with committing certain sexual offenses during a designated time period, which began prior to effective date of “One Strike” law (§ 667.61) November 30, 1994, and ended after that date, and where the prosecution did not prove that the offenses occurred after that date, sentencing under section 667.61 violated ex post facto clauses. An

ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.)

6. *People v. McQueen* (2008) 160 Cal.App.4th 27, the First Appellate District, Division 3 held that where the defendant was convicted of violent sexual offenses for which he was subject to sentencing under both the one-strike law (§ 667.61) and the habitual sex offender law (§ 667.71), enhanced in each instance by the Three Strikes Law, the court correctly imposed the habitual sex offender penalties and stayed, and did not strike, the one-strike sentence. The courts are split over whether the one strike law should be stayed or stricken, *People v. Snow* (2003) 105 Cal.App.4th 271, indicates stricken, whereas *People v. Lopez* (2004) 119 Cal.App.4th 355, indicates that it should be stayed; this court obviously sides with Lopez. But, it is clear that the Three Strike law acts to increase sentence on each count. *People v. Hiscox* (2006) 136 Cal.App.4th 253, the First Appellate District, Division 3 held that where the defendant was charged with committing certain sexual offenses during a designated time period, which began prior to effective date of “One Strike” law (§ 667.61) November 30, 1994, and ended after that date, and where the prosecution did not prove that the offenses occurred after that date, sentencing under section 667.61 violated ex post facto clauses. An ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.)

XVII. FINES, FEES AND BLOOD SAMPLES

1. *People v. Wallace* (2004) 120 Cal.App.4th 867, the Second Appellate District, Division 5, held that a court security fee of \$20, pursuant to section 1465.8, levied on persons convicted of crimes, and also on parties to various other types of proceedings, is not punitive in nature and may be imposed on defendant whose offense was committed prior to the effective date of legislation imposing the fee; therefore it is not an ex post facto violation.
2. *People v. Dickerson* (2004) 122 Cal.App.4th 1374, the Sixth Appellate District held that, pursuant to *People v. Walker* (1991) 54 Cal.3d 1013, 1027, wherein the Supreme Court stated that “[c]ourts

and the parties should take care to consider restitution fines during the plea negotiations,” does not prohibit criminal defendants from striking bargains that leave the imposition of fines to the discretion of the sentencing court. Where the court in taking the defendant’s plea, advised the defendant that the court was required to impose a restitution fine of between \$200 and \$10,000, and at sentencing imposed a fine of \$6,800 as recommended by probation report, an objection to court’s failure to advise the defendant at the time the plea was taken of the statutory mandate that a fine greater than the statutory minimum was required, was waived by counsel’s failure to make an objection at sentencing. (*People v. Walker*, supra, 53 Cal.3d at p. 1023.)

3. *People v. Sorenson* (2005) 125 Cal.App.4th 612, the Sixth Appellate District ruled, similarly to their opinion in *People v. Dickerson* (2004) 122 Cal.App.4th 1374, that a defendant, who was informed during his plea that he was subject to “fines and fees” up to a specified amount and to a restitution fine with a specified minimum and maximum amount, was adequately advised of potential fines and assessments that were within those parameters; since they were not made part of the plea agreement, their imposition did not violate the agreement. The Court of Appeal concluded by stating that the trial court need not advise the defendant of every possible statute under which he could be fined.
4. *People v. Carmichael* **REVIEW GRANTED** (S141415) formerly at: (2006) 135 Cal.App.4th 937, the First Appellate District, Division 2 held that the imposition of the \$20 court security fee within the meaning of section 1465.8, subd. (a)(1) cannot be applied retroactively, and it was not so expressly declared. (See *People v. Hayes* (1989) 49 Cal.3d 1260, 1274.) Given the fact that the statute imposes a fee on every criminal conviction, falls short of a clear and compelling indication the Legislature intended the statute to be applied retroactively, the fee cannot be imposed in this case. The Court of Appeal distinguished the result in *People v. Wallace* (2004) 120 Cal.App.4th 867, 870 which held that the fine was not punitive, and therefore did not violate the prohibition of ex post facto laws, finding that retroactivity is a separate analysis from ex post facto application.

5. *People v. Willie* (2005) 133 Cal.App.4th 43, the First Appellate District, Division 5, held that since section 1214, subd. (a) provides that enforcement of a restitution fine must be “in the manner provided for the enforcement of money judgments generally,” granting the district attorney’s motion for release of funds held in trust by the police department to pay the fine and the court’s amending the sentencing order nunc pro tunc to include an order releasing the funds were not proper enforcement methods.
6. *People v. Le* (2006) 136 Cal.App.4th 925, the Sixth Appellate District held restitution and parole revocation fines are “punishment” within meaning of section 654; therefore, the lower court erred in treating the robbery and burglary convictions as separate in calculating such fines. Where the trial court indicated its intent to impose the minimum parole revocation and restitution fines and erroneously calculated such minimums, the Court of Appeal can reduce such fines to properly calculated minimum even though the trial court would have had discretion to impose larger fines.
7. *People v. Espana* (2006) 137 Cal.App.4th 549, the Fourth Appellate District, Division 3 held that where the order requiring the defendant to give a DNA sample was overturned based on the law in effect at that time, but samples were in DNA bank when Proposition 69, under which defendant could lawfully be required to give such samples prior to release from custody, became law, the defendant was not entitled to have his samples destroyed. Proposition 69 is not an ex post facto law as applied to defendant convicted of a qualifying offense before the effective date of the statute who was confined to prison when statute was enacted. (See *Rise v. Oregon* (9th Cir. 1995) 59 F. 3d 1556, 1562; *Indianapolis v. Edmund* (2000) 531 U.S. 32 [143 L.Ed.2d 333, 121 S.Ct. 447].)
8. *People v. Zackery* (2007) 147 Cal.App.4th 680, after the granting of a petition for rehearing, the Third Appellate District held that where the clerk’s minutes of a change of plea, minutes of the sentencing, and the abstract of judgment differed from the court’s oral pronouncement and included items never orally imposed in defendant’s presence, the minutes must be stricken to reflect what actually occurred and the judgment that the judge actually pronounced. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Where the

clerk erroneously indicated in the minutes of the change of plea that the defendant changed his plea from not guilty to no contest, the sentence on that count was unauthorized and must be vacated. (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13-14.) The failure to impose a restitution fine was reversible error where the reasons for not doing so were not stated on record. (See § 1202.4, subd. (b).)

9. *People v. Chavez* **OVERRULED BY LEGISLATION**; formerly at: (2007) 150 Cal.App.4th 1288, the Second Appellate District, Division 5 held that where a defendant is convicted of cocaine possession is subject to mandatory financial penalties, including criminal laboratory analysis fee in the amount of \$50, a drug laboratory fine under section 1464, subd. (a) in the sum of \$50, a \$35 assessment under Government Code section 76000, subd. (a), a \$10 state surcharge on the criminal laboratory analysis fee, and state court construction penalties totaling \$67.50, or one-half of the criminal laboratory analysis fee, the drug laboratory fine, and the section 76000, subd. (a) assessment. The court's failure to impose any of such penalties constitutes jurisdictional error. The state surcharge of 20 percent applies to criminal laboratory analysis fee, but does not apply to section 1464, subd. (a) and section 76000, subd. (a) assessments. State court construction penalty applies to all counties regardless of whether they are participating in a local Courthouse Construction Fund or the Transitional State Court Facilities Construction Fund. The restitution fine under section 1202.4, subd. (b)(1) and parole revocation restitution fine under section 1202.45 are not enhanced by section 1464, subd. (a) and section 76000, subd. (a) penalty assessments or by the 20 percent state surcharge under section 1465.7. Court security fee of \$20, which by statute must be imposed upon conviction of any offense other than a parking violation, is enhanced by a section 1464, subd. (a) penalty assessment of \$20; a \$14 section 76000, subd. (a) penalty assessment; a \$4 section 1465.7, subd. (a) state surcharge; and a \$10 state court construction penalty, plus a \$10 state court construction penalty on the section 1464, subd. (a) assessment and a \$7 state court construction penalty on the section 76000, subd. (a) penalty assessment.
10. *People v. Crandell* (2007) 40 Cal.4th 1301, the California Supreme Court held that the court's imposition of a \$2,600 restitution fine,

which was not stated by the prosecutor when he recited parties plea agreement, did not violate the negotiated disposition where the court, before taking defendant's plea, had accurately advised him he would "have to pay a restitution fund fine of a minimum of \$200, a maximum of \$10,000" and ascertained that prosecution had not made "any other promises" beyond that he would be sentenced to 13 years in prison. The court distinguished *People v. Walker* (1991) 54 Cal.3d 1013, where it was not mentioned in the negotiations or before taking the plea, like it was, by the court, in this case.

11. *People v. Crittle* (2007) 154 Cal.App.4th 368, the Third Appellate District held that a \$20 court security fee, as provided for in section 1465.8, must be imposed based on a conviction for which punishment has been stayed pursuant to section 654. *People v. Pearson* (1986) 42 Cal.3d 351, 361 [bars use of conviction for any punitive purpose] does not apply since a fee is not punishment. (*People v. Wallace* (2004) 120 Cal.App.4th 867, 874-878.) A \$10 crime prevention fine, pursuant to section 1202.5, subd. (a), can be imposed only once in a case rather than for each conviction in a case.
12. *People v. McCoy* (2007) 156 Cal.App.4th 1246, the Second Appellate District, Division 5 held that Senate Bill 425, which amended previous provisions of law with regard to the calculation of a state court construction penalty imposed in all criminal cases, by providing that the fee imposed by county board of supervisors for local courthouse construction fund be deducted from the penalty, and by clarifying that the penalty was to not to be added to any restitution fine, to any penalty assessment imposed under section 1464, subd. (a) or section 76000, subd. (a), or to a state surcharge imposed under section 1465.7, applies to cases pending on appeal when the bill was signed into law on October 5, 2007. Where the court imposes a \$50 laboratory fee under Health and Safety Code section 11372.5, subd.(a), it is required to impose a 20 percent state surcharge pursuant to section 1465.7, subd. (a), but cannot impose a state court construction penalty in addition to the state surcharge.
13. *People v. Alford* (2007) 42 Cal.4th 749, the California Supreme Court held that, consistent with *People v. Wallace* (2004) 120 Cal.App.4th 867, 870, found that the imposed fee upon every defendant convicted of a crime pay a \$20 court security fee pursuant

to section 1465.8 is not punitive (see *People v. Castellanos* (1999) 21 Cal.4th 785), and may be applied to defendants whose offenses were committed prior to the effective date of that section without being in violation of the prohibition against ex post facto laws as it is necessary to fund court security.

14. *People v. Walz* (2008) 160 Cal.App.4th 1364, the Second Appellate District, Division 5 held that where the court imposed a \$200 sex offender fine rather than the \$300 fine set forth in section 290.3, subd. (a), the imposition of the \$200 fine was “unauthorized” and thus subject to sua sponte reversal. Where the court was authorized to fine the defendant \$500 for each sex offense conviction in excess of the first, but was also authorized not to impose the fines if it found defendant lacked the ability to pay, and the prosecution did not object to the omission of the fines, the Court of Appeals was required to presume that the lower court found that the defendant lacked the ability to pay the additional fines and that the omission of those fines was not error. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261; see also *People v. Stewart* (2004) 117 Cal.App.4th 907, 911.) On a silent record it is presumed the court determined that the defendant did not have the ability to pay and should not be compelled to pay the fine. (*Ibid.*) No assessments are levied on restitution fines (sec. 1202.4) or parole restitution fines (sec. 1202.45.) But, the assessments pursuant to sections 1464, subd. (a)(3)(A), 1265.7, subd. (a), Government Code section 70372, subd. (a)(3)(A), and Government Code section 76000, subd. (a)(3)(A) shall apply retroactively. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1257.) Additionally, a \$20.00 court security fee, pursuant to section 1465.8, applies to each conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) *People v. Alford* (2007) 42 Cal.4th 749, the California Supreme Court held that, consistent with *People v. Wallace* (2004) 120 Cal.App.4th 867, 870, found that the imposed fee upon every defendant convicted of a crime pay a \$20 court security fee pursuant to section 1465.8 is not punitive (see *People v. Castellanos* (1999) 21 Cal.4th 785), and may be applied to defendants whose offenses were committed prior to the effective date of that section without being in violation of the prohibition against ex post facto laws as it is necessary to fund court security.

15. *People v. Eddards* (2008) 162 Cal.App.4th 712, the Third Appellate District held that the court erred in ordering a defendant to pay restitution to restitution fund plus a 10 percent administrative fee because the administration fee is only statutorily authorized where restitution is made to direct victim. (See § 1203.1) An order of probation, like an abstract of judgment, must specify the statutory basis of each fine or fee imposed and cannot be lumped together.
16. *People v. Valencia* (2008) 166 Cal.App.4th 1392, the Second Appellate District, Division 5 held that a penalty could not be assessed under Government Code section 76104.6 [levying of an additional penalty of \$1 for every \$10 upon every fine, penalty, or forfeiture imposed and collected by courts for all criminal offenses], on court security fees. The penalty under section 76104.7 [providing for a penalty of \$1 for every \$10 in other fines and penalties to pay for DNA testing], could only be imposed in addition to a penalty imposed pursuant to section 76104.6. Where no penalty was imposed pursuant to section 76104.6, court erred in imposing the penalty pursuant to section 76104.7.
17. *People v. DeFrance* (2008) 167 Cal.App.4th 486, the Third Appellate District held that the trial court did not abuse its discretion in imposing \$10,000 restitution fine where defendant demonstrated it would be difficult for him to pay fine at current prison wages but did not show absolute inability to ever pay fine. (*People v. Drautt* (1998) 73 Cal.App.4th 577, 581.) The defendant must his inability to pay, and the court had the discretion to weigh the seriousness and gravity of the offense pursuant to section 1202.4, subdivision (d). Trial court's imposition of parole revocation fine was imposed in error where no parole was possible. (*People v. Jenkins* (2006) 140 Cal.App.4th 804, 819.)
18. *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, the Second Appellate District, Division 5 held that a fine of \$300 imposed after appellant plead to an offense pursuant to section 290, was an unauthorized sentence because at the time of his offense, section 290 only provided for a fine of \$200 upon a first conviction. The prohibition against ex post fact laws applies to restitution fines. (Cf. *People v. Saelle* (1995) 35 Cal.App.4th 27, 30 [a fine is calculated by the date of the offense].) Additionally, the trial court erred in failing to impose mandatory penalty assessments, the state court

construction surcharge, and state surcharge upon the mandatory restitution fine imposed under section 290. Where the correct total amount of the fine, penalty assessments, and surcharges exceeded the amount of fine that the trial court implicitly found that the defendant could pay, the defendant was entitled to remand to determine whether he could pay the correct amount. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372.)

19. *People v. Castellanos* REHEARING GRANTED: FORMERLY AT: (2009) 173 Cal.App.4th 1401, the Second Appellate District, Division 5 held that additional penalty assessments, the state surcharge, court construction penalty, and deoxyribonucleic acid penalties, must be imposed in addition to the fine imposed pursuant to section 1202.5, subdivision (a), for theft-related cases, subject to the defendant's ability to pay. All of the additional charges are mandatory. (See § 1464, subd. (a); Govt. Code § 76000, subd. (a)(1); § 1465.7, subd.(a); Gov't Code § 70372; and Gov't §§ 76104.6 and 76104.7.)
20. *People v. Robertson* (2009) 174 Cal.App.4th 206, the Third Appellate District held that, the trial court may impose a 10 percent administrative fee to cover the county's cost of collecting a "restitution fine" ordered pursuant to section 1202.4, subdivision (a)(3)(A). This court clarified its opinion in *People v. Eddards* (2008) 162 Cal.App.4th 712, which seemingly held that the court erred in ordering a defendant to pay restitution to the restitution fund plus a 10 percent administrative fee because the administration fee is only statutorily authorized where restitution is made to direct victim. (See § 1203.1)
21. *People v. Brooks* (2009) 175 Cal.App.4th 1, the Third Appellate District held that convictions for misdemeanor offenses can be assessed pursuant to Government Code section 70373, subdivision (a)(1), where the act occurred before the assessment was passed since it was nonpunitive and therefore did not violate prohibition against ex post facto laws. (*People v. Alford* (2007) 42 Cal.4th 749 [as it applies to § 1465.8, subd. (a)(1).])
22. *People v. Castellanos* (2009) 175 Cal.App.4th 1524, the Second Appellate District, Division 5 held that a fine pursuant to section 1202.5, subdivision (a) (a crime prevention program fine), pertaining

primarily to theft-related crimes, is subject to additional penalty assessments, surcharges, and further penalties, if the defendant has the ability to pay.

23. *People v. Castillo* (2010) 182 Cal.App.4th 1410, the Third Appellate District held that the trial court did not err in ordering defendant to pay a \$30 criminal conviction assessment under Government Code section 10373, which was enacted after date of defendant's offense, but the defendant's conviction occurred after the statute's effective date. The assessment did not violate ex post facto principles because it was not punitive, was not denominated a "fine," was a small amount, and was not based on the seriousness of a defendant's crime. (See *People v. Alford* (2007) 42 Cal.4th 749, 754 [pertaining to the court security fee].)
24. *People v. Fleury* (2010) 182 Cal.App.4th 1486, the Third Appellate District held that the imposition of the \$30 court facilities assessment mandated by Government Code section 70373 for crimes committed before the enactment of the statute does not violate state and federal prohibitions against ex post facto laws, as the legislature did not intend for the assessment to constitute punishment, and the assessment is not so punitive as to override the legislature's intent. (See *People v. Alford* (2007) 42 Cal.4th 749, 754 [pertaining to the court security fee].)
25. *People v. Davis* (2010) 185 Cal.App.4th 998, the Second Appellate District, Division 4 held that the new \$30-35 court facility fee pursuant to Government Code section 70353 does not apply to cases in which the defendant's conviction, was before January 1, 2009, the effective date of the statute. Where, as here, a civil disability flows as a consequence of the conviction, the majority and better rule is to require the entry of judgment. (*Helena Rubenstein v. Younger* (1977) 71 Cal.App.3d 406, 421.) Since there is no "civil disability" flowing from the small facilities fee assessment, the ordinary rule applies: the defendant was convicted when he entered the plea. Since the statute only applies to cases in which the conviction occurs on or after its effective date, it does not apply in this case.

26. *People v. Phillips* (2010) 186 Cal.App.4th 475, the Fifth Appellate District held that Government Code section 70373, subdivision (a)(1), mandating a \$30 court facilities assessment upon every conviction of a felony or a misdemeanor, applies to every conviction occurring on or after the statute's effective date, regardless of the date of the crime. (See *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1414.)
27. *People v. Knightbent* (2010) 186 Cal.App.4th 1105, the Third Appellate District held that under section 1202.5, subdivision (a), the defendant shall pay a fine of \$10 in addition to any other penalty or fine imposed, which is used to implement crime prevention programs, and shall be in addition to other fees. (See § 1202.5, subd. (b).) The fine assessed under section 1202.5 is not comparable with a restitution fine under section 1202.4 which do not have other assessment attached. (See *People v. Sorenson* (2005) 125 Cal.App.4th 612, 617.) Additionally, the Court of Appeal followed *People v. Alford* (2007) 42 Cal.4th 749, 755-759, and *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 4, finding that the assessments to the fines do not violate of ex post facto considerations. Here, appellant's crime was committed before the passage of the legislation that implemented the fees imposed.
28. *People v. Pacheco* (2010) 187 Cal.App.4th 1392, the Sixth Appellate District held that the trial court erred in ordering the defendant to pay certain fines and fees without a hearing on his ability to pay. The defendant did not forfeit objections to imposition of fines and fees in the absence of an ability-to-pay determination because such claims were based on insufficiency of the evidence and did not have to be asserted in trial court. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 [challenge to order for attorney fees based on insufficiency may be challenged for the first time on appeal]; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 [same].) An order to pay fees of court-appointed counsel is discretionary and requires proof of ability to pay. Finding of such ability may be express or implied but must be supported by substantial evidence (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 437; *People v. Kozeen* (1974) 36 Cal.App.3d 918, 920), and referral to the county revenue department for a determination of ability to pay does not meet this standard. The imposition of a booking fee

within the meaning of Government Code section 29550, subdivision (c), or Government Code sections 29550.1 or 29550.2, was error absent a determination of ability to pay and a finding that the amount imposed was not greater than the actual cost of booking. Imposition of the probation supervision fee was error where there was no evidence that the probation officer or the court made a determination of defendant's ability to pay or that defendant was advised of his right to have the court make this determination or that he waived this right, and where payment was made a condition of probation in violation of statute providing that it be collectible as a civil judgment. Cost which are collectable as civil judgments, cannot be made a condition of probation. (*People v. Washington* (2002) 100 Cal.App.4th 590, 592.) Payment of court security fee under section 1465.8 cannot be made a condition of probation. (*People v. Alford* (2007) 42 Cal.4th 749, 756, 758.)

29. *People v. Lopez* (2010) 188 Cal.App.4th 474, the Fourth Appellate District, Division 2 held that the requirement that the court impose a facilities assessment under Government Code section 70373 on defendants convicted of felonies and misdemeanors applies to all convictions incurred after that section's effective date regardless of the commission date of the crime. (*People v. Phillips* (2010) 186 Cal.App.4th 475; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1414; *People v. Knightbent* (2010) 186 Cal.App.4th 1105.)
30. *People v. Cortez* (2010) __ Cal.App.4th __, reported on November 12, 2010, in 2010 Los Angeles Daily Journal 17212, the Fourth Appellate District, Division 3 held that court impose a facilities assessment under Government Code section 70373, applies to all "convictions" for criminal and vehicle code violations. The Court of Appeal also rejected appellant's contention that there is an ex post facto violation since the statute was enacted after appellant's crimes were committed, but before he was convicted. The fee authorized is triggered by the conviction not the underlying criminal act. (*People v. Davis* (2010) 185 Cal.App.4th 998. Secondly, the fee does not act as a penalty (see *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1492), and thus ex post facto principles do not apply. (See *People v. Alford* (2007) 42 Cal.4th 749, 756.)

XVIII. NEW SENTENCING HEARING

A. APPELLANT MAY GET A NEW COMPLETELY NEW SENTENCING HEARING ON REMAND WHEN THE PREVIOUS COURT RETIRES

1. *United States v. Sanders* (9th Cir. 2005) 421 F.3d 1044, the Ninth Circuit Court of Appeal held that where the defendant was sentenced prior to *Booker*, and sentencing judge is not available to conduct a limited remand under *United States v. Ameline* (2005) 409 F.3d 1073, for the purpose of determining whether the sentence might have been different had guidelines been treated as advisory rather than mandatory, original sentence must be vacated and case remanded for a full resentencing hearing.

B. THE MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING FOR THE TRIAL COURT TO CHANGE THE RESULT

1. *People v. Lincoln* **REVIEW GRANTED** (S148900); formerly at: (2006) 144 Cal.App.4th 1016, the Second Appellate District, Division 7 held that the trial court exceeded its jurisdiction to change the sentence after the matter was remanded for the limited purpose of lifting the stay on assault convictions after the manslaughter convictions had been reversed. Even though *People v. Burbine* (2003) 106 Cal.App.4th 1250 holds that a trial court has the right to consider the entire sentence and is not limited to striking illegal portions of it when it is remanded for resentencing, the Court of Appeal did not remand for that purpose. The Court of Appeal remanded for a retrial on the manslaughter counts, and if the prosecution chose not to retry those counts, then the stays would be lifted on the assault counts; the Court of Appeal tied the hands so to speak of the trial court, and was not giving it discretion to resentence; therefore the trial court's imposition of consecutive sentences for the assault counts, must be reversed.
2. *Greenlaw v. United States* (2008) 554 U.S. ____ [171 L.Ed.2d 399, 128 S.Ct. 2559], the United States Supreme Court held that where district court erroneously sentenced the defendant to a term below the statutory minimum sentence and the defendant appealed, but the government neither appealed nor cross-appealed, the appellate court

could not order an increase in defendant's sentence. Without exception, an appellee must file a cross-appeal to justify a remedy in favor of appellee. In a "sentencing package case" involving multi-count indictments and a successful attack on some, but not all of the counts of conviction, an appellate court may vacate the entire sentence on all counts so that the trial court can reconfigure the sentencing plan.

C. UNAUTHORIZED SENTENCE

1. *People v. Ayers* (2004) 119 Cal.App.4th 1007, the Second Appellate District, Division 7, held that the trial court's erroneous failure to either double a subordinate prison term for second-striker or strike the prior-conviction finding with respect to that count (see *People v. Nguyen* (1999) 21 Cal.4th 197, 207), resulted in an "unauthorized sentence," requiring reversal on appeal despite lack of objection in trial court.
2. *People v. Dial* (2005) 130 Cal.App.4th 657, the First Appellate District, Division 2 held that appellant cannot attack, on appeal from an underlying conviction, the taking and retention of samples under mandatory requirements of section 296, the DNA Act. Further, under the Three Strikes Law, section 667, subd. (c), indicates, unless the court strike a prior, essentially pursuant to *Romero*, then the strike sentence must be imposed. The Court of Appeal failed to rule on the issue of whether the court could have "stayed" rather than strike the prior, pursuant to *People v. Aubrey* (1998) 65 Cal.App.4th 279, 283-285), since the issue was first raised at the time of the oral argument, and the parties had not had a chance to brief the issue. (See *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6.) Additionally, it is clear that the defendant cannot be placed on probation, and be sentenced to state prison at the same time. (See *People v. Marks* (1927) 83 Cal.App. 370, 376-377.)
3. *People v. Hiscox* (2006) 136 Cal.App.4th 253, the First Appellate District, Division 3 held that where the defendant was charged with committing certain sexual offenses during a designated time period, which began prior to effective date of "One Strike" law (§ 667.61) November 30, 1994, and ended after that date, and where the prosecution did not prove that the offenses occurred after that date,

sentencing under section 667.61 violated ex post facto clauses. An ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.)

4. *People v. Jordan* (2006) 141 Cal.App.4th 309, the Sixth Appellate District held that the court erred in staying the second of two five-year serious felony enhancements within the meaning of section 667, subd. (a)(1). Even though the defendant failed to object to the “sentence structure” when it was announced, the court, on remand, must restructure the sentence where the defendant did not agree in a plea bargain to condition his waiver of jury trial on court staying sentence enhancement. (See *People v. Buttram* (2003) 30 Cal.4th 773, 789 [defendant had the right to argue for an appropriate individualized sentence within the constraints of the bargain, and as a result, he maintained his right to challenge the court’s exercise or lack thereof, of that discretion.])
5. *People v. Garcia* (2007) 147 Cal.App.4th 913, the Sixth Appellate District held that, pursuant to *People v. Howard* (1997) 16 Cal.4th 1081, it was error for the court, who revoked probation and sentenced defendant to prison, to set aside a previous execution of sentence suspended sentence, wherein the prior court had ordered sex offender registration. To do otherwise would promote forum shopping. (See *People v. Superior Court (Scofield)* (1967) 249 Cal.App.2d 727, 734.)
6. *In re Renfrow* (2008) 164 Cal.App.4th 1251, the Third Appellate District held that when a defendant receives a suspended prison term and probation, but then he violates probation, and the trial court revokes probation and determines the suspended prison term, it erred and imposed an “unauthorized” sentence when it omitted an applicable enhancement. (See *People v. Howard* (1997) 16 Cal.4th 1081, 1088 [the court must order the exact sentence into effect].) Therefore, it subsequently did not err by imposing an authorized prison term that exceeded the unauthorized and previously suspended term when it imposed the section 12022.7, subdivision (a) enhancement in addition to the previously imposed ADW. The failure to impose or strike an enhancement is a legally unauthorized

sentence, and is subject to correction. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.)

D. RE-SENTENCING UNDER SECTION 1170, SUBDIVISION (D)

1. *People v. Torres* (2008) 163 Cal.App.4th 1420, the Fifth Appellate District held that section 1170, subdivision (d), which provides that when a sentence is recalled, a trial court may resentence defendant as if defendant had not previously been sentenced, provided that the new sentence does not exceed the original sentence that is not unauthorized. Here, since the defendant's original sentence was illegal and required correction, but could be restructured to bring it within the limits of the original sentence, the restriction of section 1170, subdivision (d) still applied as it was not an unauthorized sentence that could not be corrected without exceeding the original sentence. In other words, this was not a sentence that established unauthorized leniency. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311-1312.)
2. *People v. Blount* (2009) 175 Cal.App.4th 992, the Fourth Appellate District, Division 1 held that the court did not err in failing to alter the length of sentence from that agreed upon as part of a negotiated disposition under section 1170, subdivision (d). Section 1170, subdivision (d) does not provide the trial court with any broader discretion to impose sentence than that court possessed at initial sentencing and thus does not provide trial court with authority to override terms of a negotiated plea bargain and impose a different sentence than that agreed to by the parties. (See *People v. Segura* (2008) 44 Cal.4th 921, 930 [acceptance of the agreement binds the court to the agreement]; *People v. Shelton* (2006) 37 Cal.4th 759, 767 [a plea agreement is like a contract].) The court may reject the agreement, but cannot alter it.

XIX. DISCRETION TO SET CUSTODY TIME IN DEPARTMENT OF JUVENILE JUSTICE (FORMERLY CYA)

1. *In re Sean W.* (2005) 127 Cal.App.4th 1177, the First Appellate District, Division 2 held that the trial court erred in failing to take into account, in setting appellant's maximum confinement time in the California Youth Authority, the 2003 amendment to Welfare and Institutions Code section 731, subd. (b), which granted to the juvenile court the discretion to set the maximum term of a California Youth Authority commitment at less than maximum term of confinement for adult convicted of same offense. As a result of its failure to consider such a disposition, the court committed reversible error.

XX. SEX REGISTRATION

A. SEX REGISTRATION FOR FELONIES

1. *People v. Musovich* (2006) 138 Cal.App.4th 983, the Third Appellate District held that where the defendant was charged with violating former section 290, subd. (g)(2), by being "a person required to register [as a sex offender] who did willfully violate any requirement of this section," and the prosecutor elected to proceed solely on the theory that the defendant was guilty if he did not update his registration within five days of the date the parole officer allegedly discovered he was no longer at his registered address, the court correctly instructed the jury based on that theory, and any error in omitting an instruction specifically referencing 290, subd. (a)(1)(A) concerning obligation to update registration was harmless beyond a reasonable doubt where sole issue in contention was whether defendant was still living at the registered address when the parole officer visited.
2. *In re Derrick B.* (2006) 39 Cal.4th 535, the California Supreme Court held that it was error to order the minor to register under section 290, subd. (a)(2)(E), as a sex offender, unless the offenses are among those listed in subd. (d)(3), which does not include sexual battery.

3. *People v. Hofsheier* (2006) 37 Cal.4th 1185, the California Supreme Court held that the requirement that every defendant 21 years of age or older convicted of voluntary oral copulation with a person between the ages of 16 and 18 register as a sex offender violates constitutional right to equal protection, since defendant 21 or older who has voluntary sexual intercourse with a person between 16 and 18 is not subject to the mandatory registration requirement and there is no rational basis for the distinction.
4. *People v. Gonzales* (2007) 149 Cal.App.4th 304, the Second Appellate District, Division 6, held that pursuant to Penal Code section 290, subd. (g)(2), which provides that failure by a sex offender registrant to notify authorities of a change of address constitutes a felony if the underlying offense requiring registration is a felony, the court does not have the discretion to impose either felony or misdemeanor punishment, but must impose felony punishment.
5. *People v. Gonzales* (2007) ___ Cal.App.4th ___, the Second Appellate District, Division 6, held that pursuant to Penal Code section 290, subdivision (g)(2), which provides that failure by a sex offender registrant to notify authorities of a change of address constitutes a felony if the underlying offense requiring registration is a felony, the court does not have the discretion to impose either felony or misdemeanor punishment, but must impose felony punishment.
6. *People v. Fielder* (2007) 154 Cal.App.4th 712, the Fourth Appellate District, Division 1 held that a registered sex offender's act of failing to notify authorities of his whereabouts on three separate occasions were separate acts for which three separate punishments could be imposed. (See *People v. Meeks* (2004) 123 Cal.App.4th 695, 705-706; see also *People v. Davis* (2002) 102 Cal.App.4th 377.)
7. *People v. Garcia* (2008) 161 Cal.App.4th 475, the Second Appellate District, Division 1 held that in ruling on whether to grant discretionary relief from lifetime sex offender registration requirement, the court erred in its conclusion that it should not consider circumstances subsequent to defendant's conviction. The remand is to hold a hearing pursuant to *People v. Hofsheier* (2006)

37 Cal.4th 1185, but since sex registration is not punishment pursuant to *People v. Castellanos* (1999) 21 Cal.4th 785, 799, it would not be in violation of a prohibited ex post facto application if the court imposes the registration after the hearing.

8. *People v. Picklesimer* REVIEW GRANTED (S165680)
FORMERLY AT: (2008) 164 Cal.App.4th 723, the Third Appellate District held that where the defendant was convicted of sex crimes many years ago, and ordered to register as a sex offender, and appellate court affirmed, and the remittitur was filed, the trial court's jurisdiction was limited to ensuring that the judgment was enforced. The remittitur did not reconstitute the trial court with jurisdiction to entertain the defendant's motion to lift the order requiring registration following *People v. Hofsheier* (2006) 37 Cal.4th 1185. *Hofsheier's* ruling that imposition of sex offender registration requirement is discretionary, rather than mandatory, where the triggering offense is oral copulation of a minor does not apply to a defendant whose conviction was final prior to the high court's ruling. Imposition of sex offender registration requirement was not "unauthorized," therefore it could not be corrected at any time, since imposition of the requirement was "authorized," whether mandatory or discretionary, at the time of sentencing.
9. *People v. Hernandez* (2008) 166 Cal.App.4th 641, the Second Appellate District, Division 2 held that lifetime sex offender registration for offender convicted of oral copulation with minor between ages of 14 and 16, while granting the trial court discretion as to whether to impose the requirement on an offender convicted of oral copulation with minor between ages of 16 and 18, makes an irrational distinction and violates equal protection clauses of the state and federal constitutions. (See *People v. Hofsheier* (2006) 37 Cal.4th 1185; *People v. Garcia* (2008) 161 Cal.App.4th 475.) Defendant's appeal from order denying post-plea motion to vacate sex offender registration requirement was not an attack on the underlying plea of no contest or defendant's conviction, and thus did not require a certificate of probable cause. (*People v. French* (2008) 43 Cal.4th 36, 43.)
10. *People v. Milligan* REHEARING GRANTED; FORMERLY AT: (2008) 166 Cal.App.4th 1208, the Fourth Appellate District, Division

3 held that the 2003 amendment to section 290 [requires sex offenders to register and notify local law enforcement within five working days of changing residence], is regulatory, not punitive, in nature and does not violate ex post facto prohibition as applied retroactively to defendant, who was required to register as a sex offender in 1987. The defendant's challenge to 2005 amendment, which imposes a duty to register even when a defendant's conviction has been dismissed unless defendant obtains a certificate of rehabilitation and is entitled to relief from registration, was not ripe for adjudication because amendment will only apply to defendant if and when a court permits him to withdraw his guilty plea and dismisses charge against him. Statutes enacted after defendant's registration requirement arose requiring public notification and access to sex offender information do not constitute punishment and would not violate the ex post facto clauses if applied retroactively to defendant. Retroactive application of DNA collection and sampling requirements are not an ex post facto violation so long as there remains a current requirement to register.

11. *People v. Mosley* (2008) 168 Cal.App.4th 512, the Fourth Appellate District, Division 3 held that the trial court erred where it, made its own finding and required the defendant who was convicted of an assault, after a jury acquitted him on a sexual assault charge, to register as a sex offender subject to Jessica's Law's restriction on residency. The Court of Appeal found that the restriction was a penalty, and not merely regulatory under *People v. Castellanos* (1999) 21 Cal.4th 785, because of its punitive effect, despite the lack of punitive legislative intent, wherein it increased the penalty for underlying offense, which was not sexually based, beyond the statutory maximum, requiring supporting facts to be found beyond a reasonable doubt by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.)
12. *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, the Sixth Appellate District held that where petitioner filed a motion in superior court requesting that court lift lifetime registration requirement 20 years after petitioner was ordered to register, pursuant to *People v. Hofsheier* (2006) 37 Cal.4th 1185, and prosecution conceded that mandatory sex offender registration violated petitioner's right to equal protection, appellate court treated

petitioner's appeal as petition for writ of mandate. Where record indicated that neither petitioner's 1987 conviction nor petitioner's subsequent criminal history could support an order requiring sex offender registration, petitioner was entitled to writ relief directing superior court to relieve petitioner of sex offender registration requirement.

13. *People v. Williams* (2009) 171 Cal.App.4th 1667, the Fifth Appellate District held that there was sufficient evidence to establish that appellant did not register within 5 "working days" of moving back to Madera after his release from prison. Appellant contended that there were only 10 days-not including the day of his release-during which he could have established residency, and only 6 working days during that period, and two of which should not have counted since he could only stay with a friend one day, and at a Mission one day due to its proximity to a school. The Court of Appeal merely found that he began residing in Madera the day he came back to the city, especially since he had relatives in the city. Also, this appellant was sentenced to 25 to life based on his Three Strike sentence. Therefore, the defendant's ability to remain at one location for 5 consecutive days was not required to establish residence for purposes of section 290, subdivision (a)(1)(A).
14. *People v. Ranscht* (2009) 173 Cal.App.4th 1369, the Fourth Appellate District, Division 1 held that there was an equal protection violation for mandating lifetime sex offender registration for an offender convicted of sexually penetrating a 13-year-old minor, pursuant to *People v. Hofsheier* (2006) 37 Cal.4th 1185, because a similarly situated offender convicted of unlawful sexual intercourse with a victim the same age would not face mandatory lifetime registration. This court disagrees with the rationale of *People v. Manchel* (2008) 163 Cal.App.4th 1108.
15. *People v. Luansing* (2009) 176 Cal.App.4th 676, the Second Appellate District, Division 2 held, consistent with *People v. Hofsheier* (2006) 37 Cal.4th 1185, that subjecting defendant to mandatory sex offender registration based on his conviction for oral copulation with a victim more than 10 years his junior and under the age of 16 violated equal protection. This court agreed with the rationale of *People v. Ranscht* (2009) 173 Cal.App.4th 1369, and

rejected the analysis of *People v. Manchel* (2008) 163 Cal.App.4th 1108.

16. *People v. Wallace* (2009) 176 Cal.App.4th 1088, the First Appellate District, Division 3 held that pursuant to section 290, subdivision (f)(1), as it read in April 2007, evidence, that a sex offender as of a specified date more than five working days after he registered with police was no longer living at the address at which he had most recently registered, and that he failed to notify the agency with which he registered or any other agency after the last registration date that he was leaving or had left that address, was sufficient to prove that the defendant failed to notify the appropriate agency "of the move, the new address or transient location, if known, and any plans he or she has to return to California". There was no requirement that the prosecution also prove that the defendant had established a new address. The prosecution met its burden of proof with respect to actual knowledge of the sex offender registration requirement by offering evidence that the defendant received and acknowledged receiving information from several representatives of the police regarding his legal duty to notify the agency upon changing his address when he personally appeared to register on several occasions. The instruction that in order to find the defendant guilty of violating former section 290, subdivision (f)(1), the jury had to find defendant "actually knew of his duty to register as a sex offender and specifically of his duty to register within five working days of a change of residence", was inaccurate to the extent it referred to a duty to register rather than a duty to notify, but that error was harmless beyond a reasonable doubt where there was strong evidence defendant actually knew he was under a duty to notify. Under former section 290, subdivision (a)(1)(A), as amended in 2006, providing that a sex offender "for the rest of his or her life while residing in California...shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department," the prosecution is not required to prove the defendant's exact new address or that he moved to a new location within the same county, but must prove that defendant moved to a location within California. The trial court's failure to so instruct the jury was prejudicial.

17. *People v. Jeha*] (2010) 187 Cal.App.4th 1063, the Third Appellate District held that a violation section 289, subdivision (d) (penetration with a foreign object, unlike the offense in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (consensual oral cop), did not violate state and federal equal protection guarantees because the statute neither implicated a fundamental right nor operated to the singular disadvantage of a suspect class, and bore a rational relationship to a legitimate state purpose. (*Kubik v. Scripps College* (1981) 118 Cal.App.3d 544, 552.) The defendant's mandatory lifetime sex offender registration within the meaning of section 290, did not infringe a fundamental right to privacy in violation of the federal and state rights to substantive due process because the purpose it served, which was regulatory and nonpunitive, was neither arbitrary nor unreasonable. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 344; *People v. Hofsheier, supra*, 37 Cal.4th at p. 1196.)
18. *People v. Mosley* (2010) 188 Cal.App.4th 1290, the Fourth Appellate District, Division 3 held that it is now clear that facts supporting the imposition of discretionary sex offender registration must be found true by a jury beyond a reasonable doubt (see *Apprendi, Booker and Cunningham*), since imposition of such a requirement as part of sentencing on an underlying offense increases the penalty for that offense beyond the statutory maximum. Jessica's Law requirement (Proposition 83), that registered sex offender live more than 2,000 feet from any school or playground makes the registration requirement "overwhelmingly punitive" (*People v. Castellanos* (1999) 21 Cal.4th 785, 795), for purposes of the Sixth Amendment right to trial by jury.

XXI. SEX REGISTRATION FOR A MISDEMEANOR

A. SEX REGISTRATION FOR FELONIES

1. *People v. Noriega* (2004) 124 Cal.App.4th 1334, the Fourth Appellate District, Division 3, based on its interpretation of *In re Alva* (2004) 33 Cal.4th 254, held that it was required to impose on the defendant sex registration for a violation of misdemeanor indecent exposure, and that it is not cruel and unusual punishment, since registration is not punishment.

XXII. RIGHT TO ALLOCUTION

A. DEFENDANT'S RIGHT

1. *United States v. Gunning* (2005) 401 F.3d 1145, the Ninth Circuit Court of Appeal held that a defendant's right to allocution at sentencing applies to resentencing following an appeal. There is no requirement that such right be spelled out in the remand, and where allocution is denied, the error is prejudicial if the court had any discretion to impose a lesser sentence.
2. *People v. Ornelas* (2005) 134 Cal.App.4th 485, the Second Appellate District, Division 6 held that the court's failure to advise the defendant of his right to allocution (see *In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1238; § 1200), was harmless error where the defendant was represented by counsel, who objected at time of sentencing to certain aspects of the sentence, but did not object that the defendant should be given the opportunity to address the court. Statements of the defendant and counsel, relative to sentencing, were included in the probation report that was considered by the court. Additionally, the Court of Appeal found that the defendant could not show prejudice.
3. *People v. Evans* (2008) 44 Cal.4th 590, the California Supreme Court held that section 1200 (the right to allocution), gives a defendant the right to make a personal statement in mitigation of punishment, but now with the limitation that he be under oath and subject to cross-examination by the prosecutor.
4. *People v. Nitschmann* (2010) 182 Cal.App.4th 705, the Second Appellate District, Division 6 held that where the defendant demonstrated his understanding of a negotiated disposition and expressed a desire for immediate sentence, he forfeited his right to testify in mitigation of punishment, and impliedly waived his right to allocution within the meaning of section 1204 for sentencing. (See *People v. Evans* (2008) 44 Cal.4th 590, 600.) Before accepting a negotiated change of plea, a trial court need generally must determine that a factual basis for the plea (see *People v. French* (2008) 43 Cal.4th 36, 50; § 1192.5); however, as here, the parties can

stipulate to the factual basis for the plea. (*People v. Holmes* (2004) 32 Cal.4th 432, 436.

B. VICTIM TESTIFYING AT SENTENCING HEARING

1. *People v. Randall* **REVIEW GRANTED** (S157645) formerly at: (2007) 155 Cal.App.4th 228, the Third Appellate District held that the victim has a right to speak at any sentencing proceeding, not just the original proceeding, and that includes sentencing at a probation violation hearing. (See § 1191.1; *People v. Zikorus* (1983) 150 Cal.App.3d 324, 330-332.) This case presents the following issues: (1) Does Penal Code section 1191.1 grant the victim of a crime the right to be heard by a trial court at all sentencing hearings? (2) If not, what is the scope of the trial court's discretion to hear from the victim at sentencing?
2. *People v. Superior Court (Smith)* (S158084) nonpublished opinion. This case presents the following issues: (1) Does Penal Code section 1191.1 grant the victim of a crime the right to be heard by a trial court at all sentencing hearings? (2) If so, was it harmless error here for the trial court not to allow the victim, who spoke at the original sentencing hearing, to speak at the time of resentencing after the trial court recalled the original sentence?

XXIII. SENTENCE ON GREATER, DISMISS THE LESSER

1. *People v. Chan* (2005) 128 Cal.App.4th 408, the Second Appellate District, Division 5 held that the defendant cannot be convicted of violating section 288, subd. (b)(1), lewd conduct by force, and section 288, subd. (a), lewd conduct without force, where the same conduct make up both offenses, as the section 288, subd. (a) is a lesser included offense to the section 288, subd. (b)(1) offense. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692, 693 [cannot be convicted of the lesser included offense and the greater offense].)
2. *People v. Ceja* (2007) **REVIEW GRANTED:** (S157932) formerly at: 155 Cal.App.4th 1246, the Fourth Appellate District, Division 1 held that the defendant who unlawfully possessed stolen property could be convicted of receiving stolen property or theft, but could not be convicted of both charges with respect to the same property.

(*People v. Allen* (1999) 21 Cal.4th 846.) Where the defendant was convicted of both offenses, the court was required only to sentence on the greater felony offense, even though the lesser misdemeanor offense was not a lesser-included offense. This case presents the following issue: If a defendant is improperly convicted of both stealing property and receiving the same stolen property (see Pen. Code, section 496, subd. (a)), should the theft conviction or the receiving conviction be reversed?

XXIV. MULTIPLE OR SINGLE CONVICTION BASED ON THE SAME OR DIFFERENT THEORY OF THE CONVICTION

1. *People v. Garcia* (2003) 107 Cal.App.4th 1159, the Second Appellate District, Division 6, held that the prosecutor was not free to charge three counts of evading even though the defendant led three police vehicles on a lengthy high-speed chase; he could only be found guilty of one count of evading. (See *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.)
2. *People v. Williams* (2004) 120 Cal.App.4th 209, the Fourth Appellate District, Division 2 held, contrary to the well reasoned opinion in *People v. Garcia* (2003) 107 Cal.App.4th 1159, wherein the Court of Appeal held that a defendant could only be found guilty of one count of evading, and not for as many counts as number of police officers giving chase, this Court of Appeal found that a violation of section 2800.2, is a crime of violence for purposes of the multiple-victim exception to section 654, and therefore, a defendant who violated section 2800.2 while fleeing from the scene of the robbery was properly convicted of both crimes.
3. *People v. Davey* (2004) 122 Cal.App.4th 1548, the First Appellate District, Division 2 held that a defendant who commits a single act of indecent exposure within the meaning of section 314.1, and the act is witnessed by 2 minors simultaneously, he can only be sentenced on one count pursuant to section 654. (Cf. *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088-1090 [can punish multiple times for a single episode of violent conduct].) The multiple victim exception to section 654 does not apply as the act is not one of violence, nor is there a separate criminal objective to the single act.

4. *In re Carleisha P.* (2006) 144 Cal.App.4th 912, the Second appellate District, Division 3 held that section 12101, subdivision (b) (possession of live ammunition by a minor), is violated only one time by the minor who has simultaneous possession of different types of ammunition. A single crime cannot be fragmented into more than one offense. (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073.)
5. *People v. Muhammad* (2007) 157 Cal.App.4th 484, 494, the First Appellate District, Division 5 held that, a defendant can only be convicted of one count of section 646.9, as other subdivisions in the section are merely penalty provisions for stalking. Subdivisions (b), (c)(1), and (c)(2) are penalty provisions triggered when the offense of stalking as defined in subdivision (a) is committed by a person with a history of misconduct. Therefore, the Court of Appeal imposed sentence on section 646.9, subdivision (c)(2) and dismissed the other three counts of stalking. (See *People v. Ryan* (2006) 138 Cal.App.4th 360, 371.)
6. *People v. Martinez* (2008) 161 Cal.App.4th 754, the Fourth Appellate District, Division 2, held that where the defendant who unlawfully induces the victim to sign a single document in more than one place, he may only be convicted of one count of forgery.
7. *People v. Morelos* (2008) 168 Cal.App.4th 758, the Fifth Appellate District held that even though various goods were stolen from different sources, different victims, but were received on a single occasion, there can only be one offense and one guilty verdict of receiving stolen property. (*People v. Smith* (1945) 26 Cal.2d 854, 859; see also *People v. Lyons* (1958) 50 Cal.2d 245, 275.) However, absent any evidence that the defendants received stolen property on a single occasion, the jury could reasonably infer that goods were not received at one time or in one transaction, and conviction and sentencing on each count was proper. (See *People v. Bullwinkle* (1980) 105 Cal.App.3d 82, 92.) Additionally, the defendants' possession of multiple, identical checks constituted a single count of forgery. Where every forged driver's license bore personal information of one victim, multiple counts for possession of forged driver's licenses must be stricken. Where the jury could reasonably infer that defendants not only altered genuine checks but also generated fictitious checks during an ongoing forgery operation,

multiple convictions for possession of altered checks were proper. Two forgery convictions cannot arise from one check. (See *People v. Bowie* (1977) 72 Cal.App.3d 143; *People v. Carter* (1977) 75 Cal.App.3d 865.) Where there is some evidence which shows only a single crime, but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the "theory" of the defendant's guilt. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

8. *People v. Manfredi* (2008) 169 Cal.App.4th 622, the Fifth Appellate District held that simultaneous possession of multiple child pornography materials at one location was chargeable as one criminal offense under section 311.11.
9. *People v. Kenefick* (2009) 170 Cal.App.4th 114, the Third Appellate District held that where the defendant forged four individuals' signatures on two documents, he could only be convicted of two counts of forgery under section 470, subdivision (a). (See *People v. Ryan* (2006) 138 Cal.App.4th 360, 366-367.)

XXV. PROTECTIVE ORDER AGAINST THE DEFENDANT

1. *People v. Ponce* (2009) 173 Cal.App.4th 378, the Second Appellate District, Division 6 held that the trial court lacked statutory authority to issue a three-year protective order pursuant to section 136.2 against defendant at sentencing. (See *People v. Selga* (2008) 162 Cal.App.4th 113, 118). Additionally, the trial court also lacked inherent authority to issue such an order absent any evidence that defendant had threatened, or had tried to dissuade, any witness or had tried to unlawfully interfere with criminal proceedings. (*Bitter v. U.S.* (1967) 389 U.S. 15, 19 [even where a court has inherent authority over an area where the Legislature has not acted, this does not authorize issuing orders against defendants by fiat or without any valid showing to justify the need for the order].)

XXVI. A DEFENDANT CANNOT BE SENTENCED TO A PENAL CODE SECTION THAT DOES NOT STATE A CRIME, BUT IS ONLY A PENALTY PROVISION

1. *People v. Vasilyan* (2009) 174 Cal.App.4th 443, the Second Appellate District, Division 8 held that the defendant 's conviction for violating section 422.7 was void because that section states the penalty for certain crimes, but does not itself define any crime. (See *People v. Wallace* (2003) 109 Cal.App.4th 1699.) Because the conviction was void, the defendant who did not appeal, was entitled to attack it collaterally, and trial court was required to set aside the conviction on defendant's motion.

XXVII. EXPERT WITNESS AT SENTENCING HEARING EVIDENCE CODE SECTION 730

1. *People v. Stuckey* (2009) 175 Cal.App.4th 898, the Third Appellate District held that Evidence Code section 730 does not authorize the appointment of experts after trial in connection with sentencing proceedings, nor does the federal or state constitution entitle an indigent criminal defendant to improve his chances of a favorable sentencing choice by having experts echo the arguments of defense counsel. Although appointment of experts may be required when a defendant shows that they are necessary to formulate an affirmative defense to criminal charges or to rebut an expert witness retained by the prosecution to render an expert opinion at sentencing, a defendant may not require the trial court to appoint experts at public expense merely to supplement the arguments of counsel at sentencing.

XXVIII. AGGRAGATE SENTENCE IMPOSING BOTH INDETERMINATE AND DETERMINATE TERMS

1. *People v. Neely* (2009) 176 Cal.App.4th 787, the Second Appellate District, Division 6 held that the trial court erred in imposing sentence for the defendant's attempted robbery convictions based on the determination that three years was the middle term rather than two years pursuant to section 213, subdivision (b). The trial court also erred in failing to sentence the defendant for crimes punishable by imposition of determinate terms separately from the crimes

punishable by imposition of an indeterminate term and then aggregating those sentences together to form an aggregate term of imprisonment. (See *People v. Ottombrino* (1982) 127 Cal.App.3d 574, 588 [sentencing is conceptualized into separate boxes, determinate and indeterminate].) As a defendant cannot receive separate punishment for multiple offenses arising out of a single, indivisible course of conduct pursuant to section 654, the defendant's sentence for attempted robbery of the murder victim had to be stayed since the murder was committed as part of the attempted robbery. A defendant may be subject to an aggregate sentence that is greater than initially imposed when a case is remanded for resentencing because the original sentence was unlawful or unauthorized.

2. *People v. Sanders* OPINION VACATED; formerly at: (2010) 182 Cal.App.4th 1626, the Second Appellate District, Division 8 held that the trial court did not err in failing to grant a motion for a mistrial, in a murder prosecution, as the defendant's Sixth Amendment rights were not violated by trial court's decision not to strike all of witness's testimony or grant a mistrial, after the witness refused to disclose the identity of the people who he said approached him with information about unknown shooter because those questions which the witness refused to answer concerned a collateral matter and the witness was extensively examined on all subjects that were material. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736 [striking a witnesses testimony is a drastic solution, only considered after less severe remedies are considered].) One of the less severe remedies is allowing the jury to evaluate the witnesses credibility in failing to answer. (See *People v. Seminoff* (2008) 159 Cal.App.4th 518, 526.) As it pertained to the sentence, given the fact that the first count was an indeterminate count (a life sentence) when the 25 to life gun use enhancement is taken into account under section 12022.53, subdivision (d), and therefore not the principle count under the Determinate Sentencing Act, the sentence on count two was not a subordinate sentence and trial court did not err in imposing a full middle-term sentence for count two. (*People v. Mason* (2002) 96 Cal.App.4th 1, 15.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>APPRENDI, BLAKELY, BOOKER, BLACK, CUNNINGHAM</u>	1
II. <u>CONSECUTIVE V. CONCURRENT SENTENCING</u>	24
III. <u>CRUEL AND UNUSUAL PUNISHMENT</u>	27
IV. <u>CRC COMMITMENT</u>	34
V. <u>CREDITS</u>	36
A. <u>NO APPRENDI ON CREDIT LIMITATION UNDER 2933.1</u>	36
B. <u>2933.5 CREDITS (OR NOT)</u>	37
C. <u>2933.1 LIMITATIONS FOR VIOLENT AND NON-VIOLENT OFFENSES</u>	37
D. <u>PRESENTENCE CREDITS PER 2933.2</u>	40
E. <u>CREDITS ON PROBATION CASES</u>	40
F. <u>WAIVER ISSUES</u>	42
G. <u>CUSTODY CREDITS WITHIN THE MEANING OF SECTION 2900.5 ARE AWARDED FROM THE TIME THE DEFENDANT IS OFFICIALLY BOOKED INTO CUSTODY</u>	44
H. <u>PRESENTENCE CREDITS WITH AN EXISTING INSANITY COMMITMENT</u>	44
I. <u>HOME ELECTRONIC MONITORING CUSTODY CREDITS</u>	45
J. <u>WHEN EITHER OR BOTH THE PROSECUTION AND THE COURT MISINFORMED THE DEFENDANT REGARDING HIS ELIGIBILITY FOR GOOD BEHAVIOR CREDITS, TELLING HIM HE WOULD RECEIVE 15% RATHER THAN 50% HE WAS ENTITLED TO, HIS DUE PROCESS RIGHTS WERE VIOLATED, AND THEREFORE, THE CONVICTIONS ARE REVERSED</u>	45
K. <u>CRUZ WAIVER AND VARGAS WAIVER</u>	46
L. <u>HEROIC ACT STATUTE</u>	47
M. <u>SECTION 4019 CREDITS; PRESENTENCE CREDITS</u>	47

VI.	<u>ENHANCEMENTS AND PENALTY PROVISIONS</u>	51
A.	<u>DISCRETION/1385 TO STRIKE THE ENHANCEMENT</u>	51
B.	<u>TO STAY OR TO STRIKE AN ENHANCEMENT</u>	54
C.	<u>GANG ENHANCEMENTS SECTION 186.22 AND RELATED ISSUES</u>	55
D.	<u>GREAT BODILY INJURY ENHANCEMENT UNDER SECTION 12022.7, SUBDIVISION (D) IS NOT MORE SPECIFIC THAN 12022.95, AND EITHER CAN BE PLED</u>	66
E.	<u>GROUP BEATING CAN LEAD TO A FINDING OF A SERIOUS FELONY WITHIN THE MEANING OF SECTION 1192.7, SUBDIVISION (C)(8)</u>	67
F.	<u>HEALTH AND SAFETY CODE SECTION 11353.6 WITHIN SCHOOL ZONE</u>	67
G.	<u>SERIOUS FELONIES UNDER SECTION 667, SUBDIVISION (a)(1)</u>	68
H.	<u>PRISON PRIOR ENHANCEMENTS 667.5, SUBDIVISION (b)</u>	69
I.	<u>STAY THE SHORTER SENTENCE, INCLUDING ENHANCEMENTS</u>	71
J.	<u>SECTION 12022, SUBDIVISION (b)</u>	71
K.	<u>SECTION 12022, SUBDIVISION (c)</u>	73
L.	<u>SECTION 12022.5 USE V. ARMED</u>	74
M.	<u>SECTION 12022.53</u>	74
N.	<u>SECTION 12022.55</u>	81
O.	<u>SECTION 12022.6</u>	82
P.	<u>SECTION 1192.7, SUBDIVISION (c)(37)</u>	82
Q.	<u>PENAL CODE SECTION 12022.7, SUBDIVISION (a)</u>	82
R.	<u>PENAL CODE SECTION 12022.7, SUBDIVISION (b)</u>	84
S.	<u>HEALTH AND SAFETY CODE SECTION 11370.2, SUBDIVISION (a)</u>	85
T.	<u>HEALTH AND SAFETY CODE SECTIONS 11370.4 (WEIGHT) AND 11372.5, SUBDIVISION (A) (LAB FEE)</u>	85
U.	<u>MONEY LAUNDERING ENHANCEMENT SECTION 186.10</u>	86
V.	<u>BIFURCATION ISSUES</u>	86
W.	<u>SECTION 20001, SUBDIVISION (C)</u>	87
X.	<u>SECTION 213, SUBDIVISION (a)(1)(A) IS AN IN CONCERT ENHANCEMENT AND NOT A SENTENCING FACTOR</u>	88

Y.	<u>A PENALTY PROVISION CAN BE RETRIED AFTER A HUNG JURY, BY ITSELF, AND NOT WITH THE UNDERLYING SUBSTANTIVE OFFENSE AND IS NOT BARRED BY THE FEDERAL DOUBLE JEOPARDY CLAUSE OR PENAL CODE SECTION 1023</u>	88
Z.	<u>A GRANT OF A MOTION FOR A NEW TRIAL BASED ON A PENALTY ALLEGATION/FACTOR IS NOT BARRED BY THE FEDERAL DOUBLE JEOPARDY CLAUSE OR PENAL CODE SECTION 1023</u>	89
AA.	<u>THE SUBSTANTIVE COUNT ALONE AND NOT THE ENHANCEMENT DETERMINES WHETHER THE PRINCIPAL COUNT IS DETERMINATE OR INDETERMINATE AND IF THE SUBORDINATE COUNT IS FULL TERM OR ONE-THIRD THE MIDDLE TERM</u>	90
VII.	<u>PROVING A PRIOR WITH AN ADOPTIVE ADMISSION</u>	90
VIII.	<u>IS AN ASSAULT WITH A DEADLY WEAPON A PRIOR?</u>	91
IX.	<u>JURY TRIAL ON OUT OF STATE PRIORS</u>	91
X.	<u>FEDERAL AND STATE DOUBLE JEOPARDY AND SECTION 654 ISSUES</u>	93
XI.	<u>EQUAL PROTECTION</u>	114
XII.	<u>DOES THE RECORD ESTABLISH THAT THE PRIOR WAS A STRIKE IF IT CAN BE COMMITTED IN MULTIPLE WAYS</u>	114
XIII.	<u>PROBATION ISSUES</u>	115
1.	<u>DIRECT FILING ON A MINOR; PROBATION REPORT NEEDED</u> ...	115
2.	<u>HARVEY WAIVER</u>	115
3.	<u>PROBATION ELIGIBILITY</u>	116
4.	<u>WOBBLER REDUCED TO A MISDEMEANOR; SECTION 17, SUBDIVISION (B); STRAIGHT FELONY CANNOT BE REDUCED</u>	117
5.	<u>ERRORS IN PROBATION REPORT</u>	119
6.	<u>RESTITUTION PAYMENTS, PROBATION, ACQUITTED OF OFFENSE</u>	119

7.	<u>DIRECT RESTITUTION, A VICTIM OR NOT</u>	121
8.	<u>DOES THE IMPOSITION OF A RESTITUTION FINE VIOLATE A DEFENDANT’S PLEA AGREEMENT IF NOT EXPRESSED IN THE AGREEMENT?</u>	124
9.	<u>AGGREGATION OF RESTITUTION FINE PER CASE, NOT PER SENTENCING AND COURT SECURITY FEE ISSUES</u>	124
10.	<u>EXTENSION REVOCATION OF THE PROBATIONARY PERIOD</u> ...	125
11.	<u>PROBATION REVOCATION PROCEEDINGS</u>	126
12.	<u>PROBATION DENIAL UNDER SECTION 1203.066</u>	128
13.	<u>DEFERRED ENTRY OF JUDGMENT SECTION 1000</u>	128
14.	<u>PROTECTIVE ORDER IMPROPER BUT STAY AWAY ORDER AS A CONDITION OF PROBATION IS VALID</u>	129
15.	<u>NEW PROBATION REPORT ISSUES</u>	129
16.	<u>DOMESTIC VIOLENCE COUNSELING IS MANDATED AND IS NOT DISCRETIONARY WHEN SECTION 1203.097 IS REQUIRED</u> .	129
17.	<u>THE COURT CAN IMPOSE PROBATION RESTRICTIONS ON A DEFENDANT’S USE OF MEDICAL MARIJUANA</u>	130
XIV.	<u>PLEA BARGAIN CONTRACTS</u>	130
1.	<u>PLEA BARGAIN AS A CONTRACT</u>	130
2.	<u>DOES THE PRINCIPAL TERM HAVE TO BE THE LONGEST TERM OF THE CURRENT CONVICTIONS WHEN THE PLEA BARGAIN SETS A RANGE FOR THE JUDGES DISCRETION?</u>	131
3.	<u>NEED OBJECTION RE ADVICE TO STRIKE AN ENHANCEMENT RE: CONSEQUENCES OF PLEA</u>	132
XIV.	<u>SECTION 1203.4</u>	132
XV.	<u>PROPOSITION 36</u>	133
XVI.	<u>ONE STRIKE LAW SECTION 667.61</u>	140
XVII.	<u>FINES, FEES AND BLOOD SAMPLES</u>	143
XVIII.	<u>NEW SENTENCING HEARING</u>	153
1.	<u>APPELLANT MAY GET A NEW COMPLETELY NEW SENTENCING HEARING ON REMAND WHEN THE PREVIOUS COURT RETIRES</u>	153

2.	<u>THE MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING FOR THE TRIAL COURT TO CHANGE THE RESULT</u>	154
3.	<u>UNAUTHORIZED SENTENCE</u>	155
4.	<u>RE-SENTENCING UNDER SECTION 1170, SUBDIVISION (D)</u>	156
XIX.	<u>DISCRETION TO SET CUSTODY TIME IN DEPARTMENT OF JUVENILE JUSTICE (FORMERLY CYA)</u>	157
XX.	<u>SEX REGISTRATION</u>	158
A.	<u>SEX REGISTRATION FOR FELONIES</u>	158
XXI.	<u>SEX REGISTRATION FOR A MISDEMEANOR</u>	164
1.	<u>SEX REGISTRATION FOR FELONIES</u>	164
XXII.	<u>RIGHT TO ALLOCUTION</u>	164
1.	<u>DEFENDANT’S RIGHT</u>	164
2.	<u>VICTIM TESTIFYING AT SENTENCING HEARING</u>	165
XXIII.	<u>SENTENCE ON GREATER, DISMISS THE LESSER</u>	166
XXIV.	<u>MULTIPLE OR SINGLE CONVICTION BASED ON THE SAME OR DIFFERENT THEORY OF THE CONVICTION</u>	166
XXV.	<u>PROTECTIVE ORDER AGAINST THE DEFENDANT</u>	169
XXVI.	<u>A DEFENDANT CANNOT BE SENTENCED TO A PENAL CODE SECTION THAT DOES NOT STATE A CRIME, BUT IS ONLY A PENALTY PROVISION</u>	169
XXVII.	<u>EXPERT WITNESS AT SENTENCING HEARING EVIDENCE CODE SECTION 730</u>	169
XXVIII.	<u>AGGREGATE SENTENCE IMPOSING BOTH INDETERMINATE AND DETERMINATE TERMS</u>	170

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Almendarez-Torres v. United States</i> (1998)	523 U.S. 224	2, 8, 12
<i>Apprendi v. New Jersey</i> (2000).....	530 U.S. 466	1-3,
<i>Atkins v. Virginia</i> (2002).....	536 U.S. 304, 319-321	28, 30
<i>Bitter v. U.S.</i> (1967).....	389 U.S. 15	169
<i>Blakely v. Washington</i> (2004).....	542 U.S. 296	1, 3-5,
<i>Brown v. Ohio</i> (1977)	432 U.S. 161	100
<i>Brown v. Poole</i> (9th Cir. 2003).....	337 F.3d 1155	130
<i>Chapman v. California</i> (1967).....	386 U.S. 18	7
<i>Cunningham v. California</i> (2007)	549 U.S. [127 S.Ct. 856, 166 L.Ed.2d 856]	1, 3-25
<i>Edwards v. Arizona</i> (1981).....	451 U.S. 477	37
<i>Estelle v. Gamble</i> (1976)	429 U.S. 97	130
<i>Ewing v. California</i> (2003).....	538 U.S. 11	29, 31

<i>Garcia v. Carey</i> (9th Cir. 2005).....	395 F.3d 1099	59, 60
<i>Gonzalez v. Duncan</i> (9th Cir., 2008)	F.3d	32
<i>Graham v. Florida</i> (2010)	U.S.	34
<i>Greenlaw v. United States</i> (2008).....	U.S.	154
<i>Hudson v. Louisiana</i> (1981)	450 U.S. 40	100
<i>Indianapolis v. Edmund</i> (2000)	531 U.S. 32	145
<i>INS v. St. Cyr</i> (2001).....	533 U.S. 289	132
<i>Kennedy v. Louisiana</i> (2008).....	U.S.	31
<i>Lockyer v. Andrade</i> (2003)	538 U.S. 63, 73-77	28
<i>Miller v. Florida</i> (1987).....	482 U.S. 423	11
<i>Monge v. California</i> (1998).....	524 U.S. 721	3
<i>Oregon v. Ice</i> (2009).....	U.S.	22
<i>Penry v. Johnson</i> (2001) (<i>Penry II</i>)	532 U.S. 782	29

<i>Powell v. Texas</i> (1968)	392 U.S. 514	28
<i>Ramirez v. Castro</i> (9th Cir. 2004)	365 F.3d 755	28-30
<i>Reyes v. Brown</i> (9th Cir. 2005).....	399 F.3d 964	30
<i>Richardson v. United States</i> (1984).....	568 U.S. 317	98
<i>Rios v. Garcia</i> (Ninth Cir. 2004)	390 F.3d 1082	29
<i>Rise v. Oregon</i> (9th Cir. 1995).....	59 F. 3d 1556	145
<i>Rita v. United States</i> (2007).....	551 U.S. 338	8
<i>Robinson v. California</i> (1962)	370 U.S. 660, 666-667	28
<i>Roper v. Simmons</i> (2005).....	543 U.S. 351	30
<i>Rummel v. Estelle</i> (1980).....	445 U.S. 263	31
<i>Santobello v. New York</i> (1971)	404 U.S. 257	132
<i>Smith v. Massachusetts</i> (2005)	543 U.S. 462	96
<i>Smith v. Texas</i> (2004)	543 U.S. 37	29

<i>Taylor v. Lewis</i> (9th Cir. 2006).....	460 F.3d 1093	31
<i>United States v. Ameline</i> (2005)	409 F.3d 1073	154
<i>United States v. Barajas-Avalos</i> (9th Cir. 2004)	377 F.3d 1040	27
<i>United States v. Blanton</i> (9th Cir. 2007).....	476 F.3d 767	3
<i>United States v. Booker</i> (2005).....	543 U.S. ____	1, 153,
<i>United States v. Gunning</i> (2005)	401 F.3d 1145	164
<i>United States v. Martin Linen Supply Co.</i> (1977).....	430 U.S. 564	96
<i>United States v. Patterson</i> (9th Cir. 2004).....	381 F.3d 859	95
<i>United States v. Sanders</i> (9th Cir. 2005)	421 F.3d 1044	153
<i>United States v. Tighe</i> (9th Cir. 2001)	266 F.3d 1187	3, 13, 9
<i>Washington v. Recuenco</i> (2006)	548 U.S. [165 L.Ed.2d 466, 126 S.Ct. 2546]	6, 7, 15
<i>Whorton v. Bockting</i> (2007).....	549 U.S. 406	11

United States Code sections:

CALIFORNIA CASES

<i>Alvarado v. Superior Court</i> (2007).....	146 Cal.App.4th 993	74
<i>Bailey v. Superior Court</i> (1970)	4 Cal.App.3d 513	84
<i>Barragan v. Superior Court</i> (2007).....	148 Cal.App.4th 1478	17
<i>Centeno v. Superior Court</i> (2004).....	117 Cal.App.4th 30	28
<i>Cooper v. Union Bank</i> (1973).....	9 Cal.3d 371	123
<i>Fost v. Superior Court</i> (2000)	80 Cal.App.4th 724	171
<i>Gebremicael v. California Com. on Teacher Credentialing</i> (2004)...	118 Cal.App.4th 1477	117
<i>Helena Rubenstein v. Younger</i> (1977).....	71 Cal.App.3d 406	151
<i>In re Alex U.</i> (2007).....	158 Cal.App.4th 259	16
<i>In re Alva</i> (2004).....	33 Cal.4th 254	164
<i>In re Antonio P.</i> (2007).....	153 Cal.App.4th 1540	11

<i>In re Bernardino S.</i> (1992).....	4 Cal.App.4th 613	56
<i>In re Brittany L.</i> (2002).....	99 Cal.App.4th 1381	122
<i>In re Carleisha P.</i> (2006).....	144 Cal.App.4th 912	167
<i>In re Carlos E.</i> (2005).....	127 Cal.App.4th 1529	52
<i>In re Cervera</i> (2001).....	24 Cal.4th 1073	28
<i>In re Chavez</i> (2004)	114 Cal.App.4th 989	49
<i>In re Christian G.</i> (2007).....	153 Cal.App.4th 708	11, 16
<i>In re Coley</i> (2010)	Cal.App.4th	34
<i>In re Consiglio</i> (2005)	125 Cal.app.4th 511	11
<i>In re Cruz</i> (1966)	64 Cal.2d 178	58, 96
<i>In re Damien V.</i> (2008).....	Cal.App.4th	62
<i>In re Derrick B.</i> (2006)	39 Cal.4th 535	158
<i>In re Dina V.</i> (2007).....	151 Cal.App.4th 486	122

<i>In re Estrada</i> (1965)	63 Cal.2d 740	48
<i>In re Gomez</i> (2009).....	Cal.4th	22
<i>In re Gomez</i> (2009).....	Cal.App.4th	39
<i>In re Gomez</i> REVIEW GRANTED (S155425) Formerly at: (2007) 153 Cal.App.4th 1516		11
<i>In re Harris</i> (1989)	49 Cal.3d 131	68, 79
<i>In re Hawthorne</i> (2005)	35 Cal.4th 40	30
<i>In re Hoddinott</i> (1996).....	12 Cal.4th 992, 999	36
<i>In re Jacob J.</i> (2005).....	130 Cal.App.4th 429	52
<i>In re Jesse P.</i> (1992)	3 Cal.App.4th 1177	88
<i>In re Johnson</i> (1970).....	3 Cal.3d 404	19
<i>In re Jonathan T.</i> (2008).....	Cal.App.4th	88
<i>In re Joyner</i> (1989)	48 Cal.3d 487	41
<i>In re K.F.</i> (2009).....	Cal.App.4th	120
<i>In re Large</i> (2007)	41 Cal.4th 538	53

<i>In re Mehdizadeh</i> (2003)	105 Cal.App.4th 995	134
<i>In re Noelle M.</i> (2008)	169 Cal.App.4th 193	107
<i>In re Nunez</i> (2009)	Cal.App.4th	33
<i>In re Ogea</i> (2004)	121 Cal.App.4th 974	135-13
<i>In re Pacheco</i> (2007)	155 Cal.App.4th 1439	38
<i>In re Phelon</i> (2005).....	132 Cal.App.4th 1214	38, 39
<i>In re Pope</i> (2010).....	Cal.4th	39
<i>In re Reeves</i> (2005).....	35 Cal.4th 765	37, 38
<i>In re Robbins</i> (1998).....	18 Cal.4th 770	24
<i>In re Robert D.</i> (1979)	95 Cal.App.3d 767, 774-775	16
<i>In re Saade</i> (2008)	Cal.App.4th	19
<i>In re Sean W.</i> (2005).....	127 Cal.App.4th 1177	157
<i>In re Shannon B.</i> (1994).....	22 Cal.App.4th 1235	164

<i>In re Sheena K.</i> (2007).....	40 Cal.4th 875	41
<i>In re Tate</i> (2006).....	135 Cal.App.4th 756	38
<i>In re Taylor</i> (2003)	105 Cal.App.4th 1394	137
<i>In re Tommy A.</i> (2005).....	131 Cal.App.4th 1580	121
<i>In re Varnell</i> (2003).....	30 Cal.4th 1132	133
<i>In re Water of Long Valley Creek Stream System</i> (1979).....	25 Cal.3d 339	27
<i>In re Watson</i> (2010).....	181 Cal.App.4th 956	24
<i>In re Young</i> (2004).....	32 Cal.4th 900	47
<i>Kellett v. Superior Court</i> (1966).....	63 Cal.2d 822	94
<i>Kinney v. Vaccari</i> (1980).....	27 Cal.3d 348	155
<i>Kubik v. Scripps College</i> (1981).....	118 Cal.App.3d 544	163
<i>Lewis v. Superior Court</i> (2008)	Cal.App.4th	161
<i>Lopez v. Superior Court</i> (2008)	Cal.App.4th	61

<i>Lungren v. Deukmejian</i> (1988).....	45 Cal.3d 727	138
<i>Moore v. Superior Court</i> (2004).....	117 Cal.App.4th 401	133
<i>People v Glee</i> (2000)	82 Cal.App.4th 99	118, 119
<i>People v Nelson</i> (1987).....	194 Cal.App.3d 77	82
<i>People v Sengpadychith</i> (2001)	26 Cal.4th 316	61
<i>People v. Fielder</i> (2004).....	114 Cal.App.4th 1221	34
<i>People v. Abercrombie</i> (2007).....	151 Cal.App.4th 585	7
<i>People v. Abercrombie</i> (2008).....	Cal.App.4th	17
<i>People v. Acosta</i> (2002).....	29 Cal.4th 105	142
<i>People v. Akins</i> (1997).....	56 Cal.App.4th 331	58, 97
<i>People v. Albillar</i> REVIEW GRANTED (S163905) formerly at: (2008).....	162 Cal.App.4th 935	61
<i>People v. Alford</i> (2007).....	42 Cal.4th 749	147, 148
<i>People v. Alford</i> (2010).....	180 Cal.App.4th 1463	112
<i>People v. Allen</i> (1999)	21 Cal.4th 846	166

<i>People v. Alvarez</i> (1996).....	14 Cal.4th 155	72
<i>People v. Alvarez</i> (2002).....	27 Cal.4th 1161	141
<i>People v. Alvarez</i> (2009).....	Cal.App.4th	110
<i>People v. Amons</i> (2005).....	125 Cal.App.4th 855	11
<i>People v. Anderson</i> (1990)	221 Cal.App.3d 331	109
<i>People v. Anderson</i> (2009)	Cal.4th	109
<i>People v. Andra</i> (2007).....	156 Cal.App.4th 638	104
<i>People v. Antick</i> (1975).....	15 Cal.3d 79	81
<i>People v. Arata</i> (2007).....	151 Cal.App.4th 778	132
<i>People v. Arbuckle</i> (1978)	22 Cal.3d 749	128
<i>People v. Arias</i> (2010)	182 Cal.App.4th 1009	80
<i>People v. Arndt</i> (1999).....	76 Cal.App.4th 387	58, 97
<i>People v. Arnold</i> (2004).....	33 Cal.4th 294	42, 43

<i>People v. Arreola</i> (1994)	7 Cal.4th 1144	126
<i>People v. Arroyas</i> (2002)	96 Cal.App.4th 1439	61, 63
<i>People v. Athar</i> (2005)	36 Cal.4th 396	86
<i>People v. Aubrey</i> (1998)	65 Cal.App.4th 279	155
<i>People v. Augborne</i> (2002)	104 Cal.App.4th 362	59
<i>People v. Ausbie</i> (2004)	123 Cal.App.4th 855	94
<i>People v. Ayala</i> (2007)	155 Cal.App.4th 604	13
<i>People v. Ayers</i> (2004)	119 Cal.App.4th 1007	155
<i>People v. Bacon</i> (2010)	Cal.App.4th	50
<i>People v. Baker</i> (1974)	39 Cal.App.3d 550	111
<i>People v. Baneulos</i> (2005)	130 Cal.App.4th 601	91
<i>People v. Banks</i> (1959)	53 Cal.2d 370, 383-387	117
<i>People v. Banks</i> (2007)	149 Cal.App.4th 969	4, 6

<i>People v. Barkley</i> (2008)	Cal.App.4th	118
<i>People v. Barnett</i> (1995).....	35 Cal.App.4th 1	18
<i>People v. Barrigan</i> (2004)	32 Cal.4th 238	115
<i>People v. Bartell</i> (2009).....	Cal.App.4th	123
<i>People v. Batts</i> (2003).....	30 Cal.4th 660	96
<i>People v. Baughman</i> (2008)	Cal.App.4th	21
<i>People v. Bautista</i> (2005)	125 Cal.App.4th 646	57, 59
<i>People v. Beagle</i> (2004).....	125 Cal.App.4th 415	115
<i>People v. Beagle</i> (2004).....	215 Cal.App.4th 415	116
<i>People v. Beamon</i> (1973).....	8 Cal.3d 625	100, 10
<i>People v. Belmontes</i> (1983)	34 Cal.3d 335	54, 73
<i>People v. Benevides</i> (1998).....	64 Cal.App.4th 728, 735	6, 51
<i>People v. Benitez</i> (2005)	127 Cal.App.4th 1274	140
<i>People v. Benson</i> (1998).....	18 Cal.4th 24	52

<i>People v. Bernal</i> (2002)	101 Cal.App.4th 155	121, 12
<i>People v. Black</i> (2005)	35 Cal.4th 1238	1, 2
<i>People v. Black</i> (2007)	41 Cal.4th 799	5, 10-1
<i>People v. Black</i> (2009)	Cal.App.4th	43, 127
<i>People v. Blake</i> (1998)	68 Cal.App.4th 509	107
<i>People v. Blake</i> (2004)	117 Cal.App.4th 543	71
<i>People v. Bland</i> (1995)	10 Cal.4th 991	73
<i>People v. Blount</i> (2009)	Cal.App.4th	157
<i>People v. Bonnetta</i> (2009)	Cal.4th	54
<i>People v. Botello</i> (2010)	Cal.App.4th	80
<i>People v. Bowen</i> (2004)	125 Cal.App.4th 101	135
<i>People v. Bowie</i> (1977)	72 Cal.App.3d 143	168
<i>People v. Bracamonte</i> (1981)	119 Cal.App.3d 644	55, 86

<i>People v. Bracamonte</i> (2003)	106 Cal.App.4th 704	75-77,
<i>People v. Bradford</i> (1976)	17 Cal.3d 8	112
<i>People v. Bradford</i> (1997)	15 Cal.4th 1229	62
<i>People v. Bradley</i> (1998)	64 Cal.App.4th 386	53, 54,
<i>People v. Bragg</i> (2008)	Cal.App.4th	106
<i>People v. Bragg</i> (2008)	161 Cal.App.4th 1385	61
<i>People v. Brandon</i> REVIEW GRANTED (S149371); formerly at: (2006)	145 Cal.App.4th 1002	
<i>People v. Braz</i> (1998)	65 Cal.App.4th 425	84
<i>People v. Brenn</i> (2007)	152 Cal.App.4th 166	101
<i>People v. Briceno</i> (2004)	34 Cal.4th 451	56-59,
<i>People v. Briones</i> (2008)	Cal.App.4th	106
<i>People v. Britt</i> (2004)	32 Cal.4th 944	94, 112
<i>People v. Brock</i> REVIEW GRANTED AND DISMISSED :Formerly at: (2007)	155 Cal.App.4th 903	

<i>People v. Brookfield</i> (2009).....	47 Cal.4th 583	64
<i>People v. Brooks</i> (2009)	175 Cal.App.4th 1	150, 15
<i>People v. Brooks</i> (2010)	Cal.App.4th	130
<i>People v. Brown</i> (2006)	140 Cal.App.4th 76	98
<i>People v. Brown</i> (2007)	148 Cal.App.4th 911	100
<i>People v. Brown</i> REVIEW GRANTED: (S181963) formerly at: (2010)182 Cal.App.4th 1354		48-50
<i>People v. Bruner</i> (1995)	9 Cal.4th 1178	41, 42
<i>People v. Bryant</i> (2009).....	Cal.App.4th	45
<i>People v. Budwiser</i> (2006).....	140 Cal.App.4th 105	138, 13
<i>People v. Bullwinkle</i> (1980).....	105 Cal.App.3d 82	168
<i>People v. Burbine</i> (2003).....	106 Cal.App.4th 1250	154
<i>People v. Burch</i> (2007)	143 Cal.App.4th 447	87
<i>People v. Burgos</i> (2004)	117 Cal.App.4th 1209	51
<i>People v. Burnett</i> (2004).....	116 Cal.App.4th 257	148

<i>People v. Burton</i> (2006).....	143 Cal.App.4th 447	72
<i>People v. Burton</i> (2009).....	Cal.App.4th	127
<i>People v. Buser</i> (2005)	132 Cal.App.4th 1188	2
<i>People v. Buttram</i> (2003).....	30 Cal.4th 773	131, 15
<i>People v. Caesar</i> (2008)	167 Cal.App.4th 1050	79
<i>People v. Calderon</i> (1994).....	9 Cal.4th 69	55, 86,
<i>People v. Calhoun</i> (2007)	40 Cal.4th 398	79, 87
<i>People v. Callahan</i> (2006).....	144 Cal.App.4th 678	44
<i>People v. Camino</i> (2010)	Cal.App.4th	80
<i>People v. Campbell</i> (2004)	119 Cal.App.4th 1279	134, 14
<i>People v. Cantrell</i> (2009)	Cal.App.4th	109
<i>People v. Canty</i> (2004)	32 Cal.4th 1266	134
<i>People v. Carbajal</i> (1995)	10 Cal.4th 1114	121, 12

<i>People v. Cardenas</i> REHEARING GRANTED: formerly at: (2007)153 Cal.App.4th 445	10
<i>People v. Carmichael</i> REVIEW GRANTED (S141415) formerly at: (2006)135 Cal.App.4th 937	
<i>People v. Carmony</i> (2004).....33 Cal.4th 367	51, 53
<i>People v. Carmony</i> (2005).....127 Cal.App.4th 1066	30, 34
<i>People v. Carpenter</i> (1997)15 Cal.4th 312	141
<i>People v. Carr</i> (1988)204 Cal.App.3d 774	69
<i>People v. Carrasco</i> (2006).....137 Cal.App.4th 1050	75
<i>People v. Carrillo</i> (2001).....87 Cal.App.4th 1416, 1421	53
<i>People v. Carter</i> (1977)75 Cal.App.3d 865	168
<i>People v. Castagne</i> (2008)..... Cal.App.4th	139
<i>People v. Castaneda</i> (1999).....75 Cal.App.4th 611	94
<i>People v. Castellanos</i> (1999).....21 Cal.4th 254	14,
<i>People v. Castellanos</i> (2009).....173 Cal.App.4th 1401	150

<i>People v. Castellanos</i> (2009).....	175 Cal.App.4th 1524	150
<i>People v. Castenada</i> (2000).....	23 Cal.4th 743	66
<i>People v. Castillo</i> (2010)	182 Cal.App.4th 1410	150, 15
<i>People v. Cates</i> (2009).....	Cal.App.4th	129
<i>People v. Ceja</i> (2007) REVIEW GRANTED: (S157932) formerly at:	155 Cal.App.4th 1246	166
<i>People v. Cervantes</i> (2009).....	Cal.App.4th	127
<i>People v. Chambers</i> (1998)	65 Cal.App.4th 189	120
<i>People v. Chan</i> (2005)	128 Cal.App.4th 408	141, 16
<i>People v. Chatmon</i> (2005)	129 Cal.App.4th 771	130, 13
<i>People v. Chavez</i> (2004)	116 Cal.App.4th 1	35
<i>People v. Chavez</i> OVERRULED BY LEGISLATION; former at: (2007)	150 Cal.App.4th 1288	146
<i>People v. Chun</i> (2007)	155 Cal.App.4th 170	120
<i>People v. Cluff</i> (2001).....	87 Cal.App.4th 991, 1004	30
<i>People v. Cobb</i> (2004)	124 Cal.App.4th 1051	95

<i>People v. Colley</i> (1980)	113 Cal.App.3d 870	127
<i>People v. Collins</i> (2001)	26 Cal.4th 297	27
<i>People v. Conerly</i> (2009).....	176 Cal.App.4th 240	70
<i>People v. Conners</i> (2008)	Cal.App.4th	107, 12
<i>People v. Cookson</i> (1991).....	54 Cal.3d 1091	126
<i>People v. Coon</i> (2009)	173 Cal.App.4th 258	93
<i>People v. Corban</i> (2006).....	138 Cal.App.4th 1111	66
<i>People v. Coronado</i> (1995).....	12 Cal.4th 145	59, 71
<i>People v. Correa</i> (2008)	Cal.App.4th	105
<i>People v. Cortez</i> (1999)	73 Cal.App.4th 276	91, 114
<i>People v. Couch</i> (1996)	48 Cal.App.4th 1053	131, 13
<i>People v. Crandell</i> (2007).....	40 Cal.4th 1301	124, 14
<i>People v. Crites</i> (2006)	135 Cal.App.4th 1251	54, 72

<i>People v. Crittle</i> (2007)	154 Cal.App.4th 368	147
<i>People v. Cross</i> (2005) REVIEW GRANTED (S139791) formerly at:134 Cal.App.4th 500		31, 83
<i>People v. Crow</i> (1993).....	6 Cal.4th 952	123
<i>People v. Cruz</i> (1988).....	44 Cal.3d 1247	46, 47
<i>People v. Culp</i> (2000)	100 Cal.App.4th 1278	39
<i>People v. Cummings</i> (1993).....	4 Cal.4th 1233	62
<i>People v. Cunningham</i> (2001)	25 Cal.3d 926, 1044	19, 125
<i>People v. Curry</i> (2008)	158 Cal.App.4th 766	16
<i>People v. Curtin</i> (1994)	22 Cal.App.4th 528	108
<i>People v. Dagostino</i> (2004)	117 Cal.App.4th 974	134
<i>People v. Davey</i> (2004).....	122 Cal.App.4th 1548	94, 167
<i>People v. Davies</i> (2003).....	104 Cal.App.4th 1443	134
<i>People v. Davis</i> (2002)	102 Cal.App.4th 377	103, 15

<i>People v. Davis</i> (2003)	104 Cal.App.4th 1443	136
<i>People v. Davis</i> (2006)	141 Cal.App.4th 519	67
<i>People v. Davis</i> (2010)	Cal.App.4th	151
<i>People v. DeFrance</i> (2008).....	Cal.App.4th	149
<i>People v. Delgadillo</i> (2005).....	132 Cal.App.4th 1570	73
<i>People v. Delgado</i> (2006)	140 Cal.App.4th 1157	129
<i>People v. Delgado</i> (2010).....	Cal.App.4th	49
<i>People v. Deloza</i> (1998)	18 Cal.4th 585	101
<i>People v. Demirdjian</i> (2006)	144 Cal.App.4th	31
<i>People v. Dial</i> (2004).....	123 Cal.App.4th 1116	114
<i>People v. Dial</i> (2005).....	130 Cal.App.4th 657	155
<i>People v. Diaz</i> (2007)	150 Cal.App.4th 254	5
<i>People v. Dickerson</i> (2004)	122 Cal.App.4th 1374	143, 144
<i>People v. Dieck</i> (2009)	46 Cal.4th 934	47, 48

<i>People v. Doganiere</i> (1978).....	86 Cal.App.3d 237	48
<i>People v. Dorsch</i> (1992).....	3 Cal.App.4th 1346	116
<i>People v. Dove</i> (2004)	124 Cal.App.4th 1	135
<i>People v. Downey</i> (2000).....	82 Cal.App.4th 899	26, 79,
<i>People v. Drautt</i> (1998)	73 Cal.App.4th 577	149
<i>People v. Duarte</i> (2010)	Cal.App.4th	65
<i>People v. Duff</i> (2010)	Cal.4th	40
<i>People v. Duncan</i> (1990)	216 Cal.App.3d 1621	134
<i>People v. Eckley</i> (2004)	123 Cal.App.4th 1476	119, 12
<i>People v. Eddards</i> (2008)	162 Cal.App.4th 712	148, 15
<i>People v. Edgar</i> (2002).....	104 Cal.App.4th 210	141
<i>People v. Em</i> (2009)	Cal.App.4th	33
<i>People v. English</i> (2007).....	151 Cal.App.4th 1216	8

<i>People v. Enos</i> (2005).....	128 Cal.App.4th 1046	124
<i>People v. Enriquez</i> (2008)	Cal.App.4th	139
<i>People v. Eribarne</i> (2004)	124 Cal.App.4th 1463	135
<i>People v. Escobar</i> (1991)	235 Cal.App.3d 1504	107
<i>People v. Espana</i> (2006).....	137 Cal.App.4th 549	145
<i>People v. Esparza</i> (2003).....	107 Cal.App.4th 691	133
<i>People v. Esquibel</i> (2006).....	143 Cal.App.4th 645	82
<i>People v. Esquibel</i> (2008).....	Cal.App.4th	20, 83
<i>People v. Estes</i> (1983)	147 Cal.App.3d 23	103
<i>People v. Euseblo</i> (2010).....	Cal.App.4th	50
<i>People v. Evans</i> (2008)	44 Cal.4th 590	165
<i>People v. Felix</i> (2000).....	22 Cal.4th 651	56, 87,
<i>People v. Felix</i> (2009).....	Cal.App.4th	108

<i>People v. Fernandez</i> (2004).....	123 Cal.App.4th 137	82
<i>People v. Ferraez</i> (2003)	112 Cal.App.4th 925	66, 101
<i>People v. Ferrando</i> (2004)	115 Cal.App.4th 917	133
<i>People v. Ferris</i> (2005).....	130 Cal.App.4th 773	1
<i>People v. Feyrer</i> (2010).....	Cal.4th	118
<i>People v. Fielder</i> (2004)	114 Cal.App.4th 1221	69
<i>People v. Fielder</i> (2007).....	154 Cal.App.4th 712	102, 15
<i>People v. Fields</i> (1996).....	13 Cal.4th 289	101
<i>People v. Fiu</i> (2008)	Cal.App.4th	62
<i>People v. Fleury</i> (2010)	Cal.App.4th	151
<i>People v. Flores</i> (2005)	129 Cal.App.4th 1401	52, 58,
<i>People v. Flores</i> (2007)	157 Cal.App.4th 216	15
<i>People v. Fluker</i> (2007)	151 Cal.App.4th 515	7
<i>People v. Foreman</i> (2005)	126 Cal.App.4th 338	136, 13

<i>People v. Franklin</i> (1999).....	20 Cal.4th 249	56
<i>People v. Frausto</i> (2009) ____	Cal.App.4th	79
<i>People v. Frazier</i> (2009).....	Cal.App.4th	84
<i>People v. Frederick</i> (2006).....	142 Cal.App.4th 400	82
<i>People v. French</i> (2008)	43 Cal.4th 36	17, 160
<i>People v. Friedeck</i> (2010).....	Cal.App.4th	140
<i>People v. Fuller</i> (2006).....	135 Cal.App.4th 1336	142
<i>People v. Gaio</i> (2000).....	81 Cal.App.4th 919	82
<i>People v. Galvan</i> (2007)	155 Cal.App.4th 978	127
<i>People v. Galvan</i> (2008)	Cal.App.4th	84
<i>People v. Gamble</i> (2008)	Cal.App.4th	26
<i>People v. Garcia</i> (2001)	25 Cal.4th 744	141
<i>People v. Garcia</i> (2002)	28 Cal.4th 1166	81

<i>People v. Garcia</i> (2003)	107 Cal.App.4th 1159	93, 109
<i>People v. Garcia</i> (2004)	118 Cal.App.4th 987	115
<i>People v. Garcia</i> (2004)	121 Cal.App.4th	36
<i>People v. Garcia</i> (2007)	147 Cal.App.4th 913	156
<i>People v. Garcia</i> (2007)	153 Cal.App.4th 1499	101
<i>People v. Garcia</i> (2007)	155 Cal.App.4th 929	103
<i>People v. Garcia</i> (2008)	159 Cal.App.4th 163	16
<i>People v. Garcia</i> (2008)	161 Cal.App.4th 475	18, 159
<i>People v. Garcia</i> (2008)	167 Cal.App.4th 1550	53, 54,
<i>People v. Garza</i> (2005).....	35 Cal.4th 866	117
<i>People v. Gilbreth</i> (2007)	156 Cal.App.4th 53	117
<i>People v. Giordano</i> (2007)	42 Cal.4th 644	122
<i>People v. Gonzales</i> (2001).....	87 Cal.App.4th 1	75

<i>People v. Gonzales</i> (2007).....	___ Cal.App.4th ___	159
<i>People v. Gonzales</i> (2007).....	149 Cal.App.4th 304	158
<i>People v. Gonzalez</i> (2006).....	138 Cal.4th 932	8, 40
<i>People v. Gonzalez</i> (2008).....	43 Cal.4th 1118	77, 78
<i>People v. Gonzalez</i> (2010).....	Cal.App.4th	64
<i>People v. Gonzalez</i>	(S149898)	83
<i>People v. Goodliffe</i> (2009).....	177 Cal.App.4th 723	27
<i>People v. Goodwillie</i> (2007).....	147 Cal.App.4th 695	45, 46
<i>People v. Govan</i> (2007)	150 Cal.App.4th 1015	6
<i>People v. Granado</i> (1996)	49 Cal.App.4th 317	74, 75
<i>People v. Grandy</i> (2006).....	144 Cal.App.4th 33	76
<i>People v. Grayson</i> (2007)	155 Cal.App.4th 1059	13
<i>People v. Griffin</i> (2005).....	128 Cal.App.4th 1112	24
<i>People v. Guess</i> (2007)	158 Cal.App.4th 283	15

<i>People v. Guiffre</i> (2008)	Cal.App.4th	120
<i>People v. Gunter</i> (2007)	156 Cal.App.4th 913	14
<i>People v. Guzman</i> (1996)	45 Cal.App.4th 1023	98
<i>People v. Guzman</i> (2005)	35 Cal.4th 577	136
<i>People v. Haddad</i> (2009)	176 Cal.App.4th 270	140
<i>People v. Hairston</i> (2009)	Cal.App.4th	109
<i>People v. Hall</i> (2000)	83 Cal.App.4th 1084	94, 95,
<i>People v. Haller</i> (2009)	174 Cal.App.4th 1080	33
<i>People v. Hamilton</i> (1978)	80 Cal.App.3d 124	107
<i>People v. Hamlin</i> (2009)	Cal.App.4th	22, 32,
<i>People v. Hansen</i> (1994)	9 Cal.4th 300	72
<i>People v. Harbert</i> (2009)	170 Cal.App.4th 42	107
<i>People v. Harris</i> (1990)	226 Cal.App.3d 131	127

<i>People v. Harris</i> (2009)	Cal.App.4th	139
<i>People v. Hartley</i> (2007).....	156 Cal.App.4th 589	138
<i>People v. Hartsell</i> (1973).....	34 Cal.App.3d 8	145
<i>People v. Harvey</i> (1979)	25 Cal.3d 754	12, 115
<i>People v. Hayes</i> (1989).....	49 Cal.3d 1260	144
<i>People v. Haykel</i> (2002)	96 Cal.App.4th 146	91
<i>People v. Hazle</i> (2007)	157 Cal.App.4th 567	138, 13
<i>People v. Hendricks</i> (1987)	43 Cal.3d 584	39
<i>People v. Hernandez</i> (2004)	33 Cal.4th 1040	55, 61,
<i>People v. Hernandez</i> (2005)	134 Cal.App.4th 474	75
<i>People v. Hernandez</i> (2008)	Cal.App.4th	160
<i>People v. Hernandez</i> PETITION FOR REVIEW GRANTED (S151549) AND BRIEFING DEFERRED: formerly at: (2007).....	147 Cal.App.4th 1266	3, 25
<i>People v. Herrera</i> (1999).....	70 Cal.App.4th 1456	66, 101

<i>People v. Hester</i> (2000)	22 Cal.4th 290	111
<i>People v. Hilger</i> (2005)	131 Cal.App.4th 1528	43
<i>People v. Hill</i> (2004).....	119 Cal.App.4th 1192	24
<i>People v. Hill</i> (2006).....	142 Cal.App.4th 770	60
<i>People v. Hinkel</i> (2005)	125 Cal.App.4th 845	135
<i>People v. Hiscox</i> (2006).....	136 Cal.App.4th 253	142, 14
<i>People v. Hofsheier</i> (2006)	37 Cal.4th 1185	158-16
<i>People v. Holmes</i> (2004).....	32 Cal.4th 432	165
<i>People v. Holt</i> (1991).....	226 Cal.App.3d 962, 967	36
<i>People v. Hopkins</i> REVIEW GRANTED (2010).....	184 Cal.App.4th 615	50
<i>People v. House</i> (2010).....	183 Cal.App.4th 1049	48, 49
<i>People v. Howard</i> (1997).....	16 Cal.4th 1081	119, 15
<i>People v. Huff</i> (1990).....	223 Cal.App.3d 1100	41, 42

<i>People v. Hunter</i> (1977)	68 Cal.App.3d 389	48
<i>People v. Ibarra</i> (2007)	156 Cal.App.4th 1174	14
<i>People v. Izaguirre</i> (2007)	42 Cal.4th 126	102
<i>People v. Jackson</i> (2005)	134 Cal.App.4th 929	125
<i>People v. Jackson</i> (2009)	Cal.App.4th	68
<i>People v. Jefferson</i> (2007)	154 Cal.App.4th 1381	12, 23
<i>People v. Jeffery</i> (2006)	142 Cal.App.4th 192	35
<i>People v. Jeffrey</i> (2004)	33 Cal.4th 312	43
<i>People v. Jaha</i> (2010)	Cal.App.4th	163
<i>People v. Jenkins</i> (2006)	140 Cal.App.4th 804	149
<i>People v. Jennings</i> (2005)	128 Cal.App.4th 42	123
<i>People v. Jensen</i> (1992)	4 Cal.App.4th 978	46
<i>People v. Jimenez</i> (1992)	8 Cal.App.4th 391	76
<i>People v. Jimenez</i> (1995)	33 Cal.App.4th 54	67

<i>People v. Johnson</i> (1955)	134 Cal.App.2d 140	132
<i>People v. Johnson</i> (1978)	82 Cal.App.3d 183	42
<i>People v. Johnson</i> (2002)	28 Cal.4th 1050, 1054-1055	42, 43
<i>People v. Johnson</i> (2003)	114 Cal.App.4th 284	137
<i>People v. Johnson</i> (2006)	145 Cal.App.4th 895	69
<i>People v. Johnson</i> (2010)	Cal.App.4th	40
<i>People v. Jones</i> (1993).....	5 Cal.4th 1142	70
<i>People v. Jones</i> (1998).....	63 Cal.App.4th 744	69
<i>People v. Jones</i> (2000).....	82 Cal.App.4th 485	54, 72
<i>People v. Jones</i> (2001).....	25 Cal.4th 98	142
<i>People v. Jones</i> (2007).....	57 Cal.App.4th 1373	54, 72
<i>People v. Jones</i> (2009).....	Cal.4th	63
<i>People v. Jones</i> (2009).....	178 Cal.App.4th 853	22, 108

<i>People v. Jones</i> (2010).....	Cal.App.4th	50
<i>People v. Jordan</i> (1986)	42 Cal.3d 308	141
<i>People v. Jordan</i> (2006)	141 Cal.App.4th 309	2, 131,
<i>People v. Juarez</i> (2004)	114 Cal.App.4th 1095	42
<i>People v. Keating</i> (2010)	Cal.App.4th	50
<i>People v. Kelii</i> (1999)	21 Cal.4th 452	12
<i>People v. Kellogg</i> (2004)	119 Cal.App.4th 593	28
<i>People v. Kelly</i> (1983)	33 Cal.3d 267	69
<i>People v. Kendrick</i> (2004)	122 Cal.App.4th 1305	136
<i>People v. Kenefick</i> (2009)	170 Cal.App.4th 114	108, 16
<i>People v. Kimbell</i> (2008)	Cal.App.4th	39
<i>People v. Kirk</i> (2006)	141 Cal.App.4th 715	128
<i>People v. Kleinman</i> (2004)	123 Cal.App.4th 1476	119

<i>People v. Knightbent</i> (2010)	Cal.App.4th	152
<i>People v. Knightbent</i> (2010)	186 Cal.App.4th 1105	153
<i>People v. Kozeen</i> (1974)	36 Cal.App.3d 918	152
<i>People v. Kunkel</i> (1985)	176 Cal.App.3d 46	119
<i>People v. Lagunas</i> (1994)	8 Cal.4th 1030	89, 110
<i>People v. Lai</i> (2006)	138 Cal.App.4th 1227	123
<i>People v. Lamas</i> (2007)	42 Cal.4th 516	60
<i>People v. Landaverde</i> (2007)	157 Cal.App.4th 28	14
<i>People v. Landon</i> (2010)	Cal.App.4th	49, 127
<i>People v. Langston</i> (2004)	33 Cal.4th 1237	69, 71
<i>People v. Latimer</i> (1993)	5 Cal.4th 1203	100, 101
<i>People v. Lawrence</i> (2000)	24 Cal.4th 219	106
<i>People v. Le</i> (2006)	136 Cal.App.4th 925	98, 145
<i>People v. Leffel</i> (1987)	196 Cal.App.3d 1310	129

<i>People v. Lemas</i> (2007)	42 Cal.4th 516	66
<i>People v. Lewis</i> (2004)	120 Cal.App.4th 837	116
<i>People v. Linarez</i> REVIEW GRANTED; formerly at: (2007)	155 Cal.App.4th 1393	116
<i>People v. Lincoln</i> (2007).....	157 Cal.App.4th 196	15
<i>People v. Lincoln</i> REVIEW GRANTED (S148900); formerly at: (2006).....	144 Cal.App.4th 1016	154
<i>People v. Lochtefeld</i> (2000).....	77 Cal.App.4th 533	78
<i>People v. Looney</i> (2004)	125 Cal.App.4th 242	106
<i>People v. Lopez</i> (2004)	119 Cal.App.4th 132	93, 113
<i>People v. Lopez</i> (2005)	129 Cal.App.4th 1508	152
<i>People v. Lopez</i> (2005)	34 Cal.4th 1002	57, 62
<i>People v. Lopez</i> (2010)	Cal.App.4th	153
<i>People v. Love</i> (2008)	Cal.App.4th	117
<i>People v. Lowe</i> (2007)	40 Cal.4th 937	25

<i>People v. Lozano</i> (2007)	150 Cal.App.4th 1304	7
<i>People v. Luansing</i> (2009)	Cal.App.4th	162
<i>People v. Luckett</i> (1996)	48 Cal.4th 1214	12
<i>People v. Luna</i> (2003)	113 Cal.App.4th 395	91
<i>People v. Lyons</i> (1958)	50 Cal.2d 245	168
<i>People v. Maki</i> (1985)	39 Cal.3d 707	126
<i>People v. Maldonado</i> (2005)	134 Cal.App.4th 627	59
<i>People v. Mancebo</i> (2002)	27 Cal.4th 735	80, 142
<i>People v. Manchel</i> (2008)	163 Cal.App.4th 1108	162
<i>People v. Manfredi</i> (2008)	169 Cal.App.4th 622	168
<i>People v. Manila</i> (2006)	139 Cal.App.4th 589	71
<i>People v. Margarejo</i> (2008)	Cal.App.4th	61
<i>People v. Marks</i> (1927)	83 Cal.App. 370	155

<i>People v. Marquez</i> (2003).....	30 Cal.4th 14, 20-21	41
<i>People v. Martin</i> (2005).....	133 Cal.App.4th 776	97
<i>People v. Martin</i> (2009).....	Cal.App.4th	116
<i>People v. Martinez</i> (1995)	37 Cal.App.4th 1589	25
<i>People v. Martinez</i> (1999)	76 Cal.App.4th 489	117
<i>People v. Martinez</i> (2000)	22 Cal.4th 750, 756-766	25
<i>People v. Martinez</i> (2004)	116 Cal.App.4th 753	56
<i>People v. Martinez</i> (2005)	127 Cal.App.4th 1156	137
<i>People v. Martinez</i> (2005)	132 Cal.App.4th 531	58
<i>People v. Martinez</i> (2005)	36 Cal.4th 384	121, 12
<i>People v. Martinez</i> (2007)	156 Cal.App.4th 851	104
<i>People v. Martinez</i> (2008)	161 Cal.App.4th 754	105, 16
<i>People v. Mason</i> (2002).....	96 Cal.App.4th 1	56, 87,
<i>People v. Mauch</i> (2008).....	Cal.App.4th	117

<i>People v. McCoy</i> (2007)	156 Cal.App.4th 1246	147, 14
<i>People v. McCray</i> (2006).....	144 Cal.App.4th 258	53, 54,
<i>People v. McEwan</i> (2007).....	147 Cal.App.4th 173	45
<i>People v. McFarland</i> (1989).....	47 Cal.3d 798	108, 11
<i>People v. McFearson</i> REVIEW GRANTED THEN TRANSFERED TO FIFTH DISTRICT (SEE INFRA) Formerly at: (2008).....	158 Cal.App.4th 810	69, 70
<i>People v. McGee</i> (2006)	38 Cal.4th 682	2, 9, 91
<i>People v. McGinnis</i> (2001).....	87 Cal.App.4th 592, 595	35
<i>People v. McQueen</i> (2008)	Cal.App.4th	142
<i>People v. Medeiros</i> (1994).....	25 Cal.App.4th 1260	125
<i>People v. Medrano</i> (2008)	161 Cal.App.4th 1514	18
<i>People v. Meeks</i> (2004).....	123 Cal.App.4th 695	34, 159
<i>People v. Meloney</i> (2003)	30 Cal.4th 1145	54, 73
<i>People v. Mendez</i> (1999)	19 Cal.4th 1084	126, 13

<i>People v. Mendez</i> (2007)	151 Cal.App.4th 861	44
<i>People v. Mendez</i> (2010)	Cal.App.4th	34
<i>People v. Mendoza</i> (2000)	24 Cal.4th 130	62
<i>People v. Mendoza</i> (2009)	Cal.App.4th	126
<i>People v. Mesa</i> (1975)	14 Cal.3d 466	145
<i>People v. Mesa</i> (2010)	Cal.App.4th	65, 112
<i>People v. Mgebrov</i> (2008)	Cal.App.4th	132
<i>People v. Miller</i> (1977)	18 Cal.3d 873	93, 95
<i>People v. Miller</i> (2006)	145 Cal.App.4th 206	131
<i>People v. Miller</i> (2008)	Cal.App.4th	20, 26
<i>People v. Milligan</i> (2008)	Cal.App.4th	160
<i>People v. Miralrio</i> (2008)	Cal.App.4th	46
<i>People v. Misa</i> (2006)	140 Cal.App.4th 837	53, 54,

<i>People v. Mitchell</i> (2001)	26 Cal.4th 181	145
<i>People v. Mitchell</i> (2004)	118 Cal.App.4th 1145	35
<i>People v. Moberly</i> (2009)	Cal.App.4th	23
<i>People v. Modiri</i> (2006).....	39 Cal.4th 481	67
<i>People v. Monarrez</i> (1998).....	66 Cal.App.4th 710	104
<i>People v. Moniz</i> (2006).....	129 Cal.App.4th 421	137
<i>People v. Monjaras</i> (2008)	Cal.App.4th	77
<i>People v. Montes</i> (2003)	31 Cal.4th 350	64, 80
<i>People v. Montoya</i> (2004).....	33 Cal.4th 1031	99
<i>People v. Morelos</i> (2008)	168 Cal.App.4th 758	168
<i>People v. Moringlane</i> (1982).....	127 Cal.App.3d 811	58, 97
<i>People v. Morris</i> (1979).....	97 Cal.App.3d 358	46
<i>People v. Morton</i> (2007).....	152 Cal.App.4th 323	8

<i>People v. Morton</i> (2008).....	Cal.App.4th	16
<i>People v. Moseley</i> (2008)	164 Cal.App.4th 1598	106, 10
<i>People v. Mosley</i> (2007)	155 Cal.App.4th 313	25
<i>People v. Mosley</i> (2010)	Cal.App.4th	164
<i>People v. Mosley</i> REVIEW GRANTED (S168411): FORMERLY AT: (2008).....	168 Cal.App.4th 512	
<i>People v. Muhammad</i> (2007).....	157 Cal.App.4th 484	105, 10
<i>People v. Munoz</i> (2007).....	155 Cal.App.4th 160	12, 115
<i>People v. Munoz</i> (2009).....	178 Cal.App.4th 468	78
<i>People v. Murphy</i> (2001)	25 Cal.4th 136	68
<i>People v. Murphy</i> (2007)	154 Cal.App.4th 979	103
<i>People v. Murray</i> (2007).....	155 Cal.App.4th 149	36
<i>People v. Musovich</i> (2006)	138 Cal.App.4th 983	158
<i>People v. Mustafaa</i> (1994).....	22 Cal.App.4th 1305	157
<i>People v. Myers</i> (2009).....	Cal.App.4th	118

<i>People v. Navarro</i> (2007)	40 Cal.4th 668	99
<i>People v. Neely</i> (2004).....	124 Cal.App.4th 1258	82
<i>People v. Neely</i> (2009).....	176 Cal.App.4th 787	170
<i>People v. Newton</i> (2010).....	Cal.App.4th	85, 113
<i>People v. Ngoun</i> (2001)	88 Cal.App.4th 432	66
<i>People v. Nguyen</i> (1993).....	13 Cal.App.4th 114	131, 133
<i>People v. Nguyen</i> (1999).....	21 Cal.4th 197	155
<i>People v. Nguyen</i> (2005).....	130 Cal.App.4th 350	13, 37
<i>People v. Nguyen</i> (2009).....	Cal.4th	92
<i>People v. Nichols</i> (2009).....	Cal.App.4th	23, 33
<i>People v. Nilsen</i> (1988).....	199 Cal.App.3d 344	152
<i>People v. Nitschmann</i> (2010).....	Cal.App.4th	165
<i>People v. Noriega</i> (2004).....	124 Cal.App.4th 1334	164

<i>People v. Norman</i> (2003).....	109 Cal.App.4th 221	117
<i>People v. Norton</i> (2010)	Cal.App.4th	49
<i>People v. Nubla</i> (1999).....	74 Cal.App.4th 719	35, 45
<i>People v. Nunez</i> (2008).....	Cal.App.4th	38
<i>People v. Oates</i> (2004)	32 Cal.4th 1048	59,
<i>People v. Ochoa</i> (2009)	Cal.App.4th	129
<i>People v. Oganessian</i> (1999).....	70 Cal.App.4th 1178	21
<i>People v. Orabuena</i> (2004).....	116 Cal.App.4th 84	133
<i>People v. Ornelas</i> (2005).....	134 Cal.App.4th 485	164
<i>People v. Ortega</i> (1998)	19 Cal.4th 686	58, 99,
<i>People v. Ottombrino</i> (1982)	127 Cal.App.3d 574	170
<i>People v. Otubuah</i> (2010).....	Cal.App.4th	49
<i>People v. Pacheco</i> (2010).....	Cal.App.4th	152

<i>People v. Palacios</i> (2005).....	126 Cal.App.4th 859	58, 97
<i>People v. Palacios</i> (2007).....	41 Cal.4th 720	101
<i>People v. Palmer</i> (2005)	133 Cal.App.4th 1141	76, 77
<i>People v. Palmer</i> (2006)	142 Cal.App.4th 724	92
<i>People v. Paltmore</i> (2000)	79 Cal.App.4th 1290	65, 98
<i>People v. Panizzon</i> (1996)	13 Cal.4th 68	126
<i>People v. Parker</i> (1967).....	255 Cal.App.2d 664	105
<i>People v. Pearson</i> (1986)	42 Cal.3d 351	101, 14
<i>People v. Pelayo</i> (2010).....	Cal.App.4th	49
<i>People v. Peneda</i> (1995).....	32 Cal.App.4th 1022	85
<i>People v. Percelle</i> (2005)	126 Cal.App.4th 164	120
<i>People v. Peregrina-Larios</i> (1994)	22 Cal.App.4th 1522	103
<i>People v. Perez</i> (1979).....	23 Cal.3d 545	107, 11
<i>People v. Perry</i> (2007).....	154 Cal.App.4th 1521	103

<i>People v. Peterson</i> (1973).....	9 Cal.3d 717	119, 12
<i>People v. Pham</i> (2009)	Cal.App.4th	23
<i>People v. Phillips</i> (2010)	Cal.App.4th	151
<i>People v. Phillips</i> (2010)	186 Cal.App.4th 475	153
<i>People v. Picado</i> (2004)	123 Cal.App.4th 1216	95
<i>People v. Picklesimer</i> (2008).....	164 Cal.App.4th 723	159
<i>People v. Picklesimer</i> (2010).....	48 Cal.4th 330	163
<i>People v. Pitto</i> (2008).....	Cal.4th	73
<i>People v. Ponce</i> (2009).....	Cal.App.4th	169
<i>People v. Poslof</i> (2004).....	119 Cal.App.4th 215	52
<i>People v. Poslof</i> (2005).....	126 Cal.App.4th 92	29
<i>People v. Prather</i> (1990)	50 Cal.3d 428	70
<i>People v. Presley</i> (2007).....	156 Cal.App.4th 1027	14

<i>People v. Pruitt</i> (2008)	161 Cal.App.4th 637	41
<i>People v. Puente</i> (2008).....	165 Cal.App.4th 1143	47
<i>People v. Quintanilla</i> (2009)	Cal.App.4th	26
<i>People v. Rabanales</i> (2008).....	Cal.App.4th	21
<i>People v. Rameriz</i> (2010)	Cal.App.4th	81
<i>People v. Ramirez</i> (1987)	189 Cal.App.3d 603	106
<i>People v. Ramon</i> (2009)	Cal.App.4th	109
<i>People v. Ramos</i> (1990).....	50 Cal.App.4th 81	38
<i>People v. Ramos</i> (2004).....	121 Cal.App.4th 1194	56, 87
<i>People v. Randall</i> REVIEW GRANTED (S157645) formerly at: (2007)155 Cal.App.4th 228		
<i>People v. Ranscht</i> (2009).....	173 Cal.App.4th 1369	162
<i>People v. Ratcliff</i> (1990).....	223 Cal.App.3d 1401	112
<i>People v. Ravaux</i> (2006).....	142 Cal.App.4th 914	44

<i>People v. Reaves</i> (1974)	42 Cal.App.3d 852	74
<i>People v. Reed</i> (2005).....	129 Cal.App.4th 1281	85
<i>People v. Reed</i> (2006).....	38 Cal.4th 1224	98, 102
<i>People v. Reeder</i> (1984)	152 Cal.App.3d 900, 923	4, 25
<i>People v. Reeves</i> (2005).....	35 Cal.4th 765	38
<i>People v. Renfrow</i> (2008)	Cal.App.4th	156
<i>People v. Retanan</i> (2007)	154 Cal.App.4th 1219	12
<i>People v. Reyes</i> (2007)	150 Cal.App.4th 735	5
<i>People v. Reyes</i> (2008)	Cal.App.4th	40
<i>People v. Ringo</i> (2005)	134 Cal.App.4th 870	68
<i>People v. Robertson</i> (2009)	Cal.App.4th	150
<i>People v. Robles</i> (2000).....	23 Cal.4th 1106	60, 115
<i>People v. Rodriguez</i> (1988)	206 Cal.App.3d 517	58, 97
<i>People v. Rodriguez</i> (1998)	17 Cal.3d 253	114

<i>People v. Rodriguez</i> (1999)	20 Cal.4th 1	77, 78
<i>People v. Rodriguez</i> (2005)	129 Cal.App.4th 1401	24, 142
<i>People v. Rodriguez</i> (2007)	157 Cal.App.4th 14	104
<i>People v. Rodriguez</i> (2009)	47 Cal.4th 501	63, 65,
<i>People v. Rodriguez</i> (2010)	Cal.App.4th	66
<i>People v. Rodriguez</i> REVIEW GRANTED: (S181808) formerly at: (2010)182 Cal.App.4th 53548, 49		
<i>People v. Rodriquez</i> (1990)	51 Cal.3d 437	127
<i>People v. Romero</i> (2006)	140 Cal.App.4th 15	4, 2
<i>People v. Romo</i> (1975)	14 Cal.3d 189, 196	16
<i>People v. Rouser</i> (1997)	59 Cal.App.4th 1065	167
<i>People v. Rubics</i> (2006)	136 Cal.App.4th 452	121
<i>People v. Ruiloba</i> (2005)	131 Cal.App.4th 674	87
<i>People v. Russo</i> (2001)	25 Cal.4th 1124	168

<i>People v. Ryan</i> (2006).....	138 Cal.App.4th 360	105, 16
<i>People v. Saelle</i> (1995)	35 Cal.App.4th 27	149
<i>People v. Sage</i> (1980).....	26 Cal.3d 498	45
<i>People v. Salcido</i> (2007).....	149 Cal.App.4th 356	66
<i>People v. Sanchez</i> (2001).....	24 Cal.4th 983	52, 103
<i>People v. Sanchez</i> (2009).....	179 Cal.App.4th 1297	65, 66,
<i>People v. Sanders</i> (1997).....	52 Cal.App.4th 175	26
<i>People v. Sanders</i> (2003).....	111 Cal.App.4th 1371	103
<i>People v. Sanders</i> (2009).....	Cal.App.4th	36
<i>People v. Sanders</i> (2010).....	Cal.App.4th	170
<i>People v. Sanders</i> (2010).....	Cal.App.4th	90
<i>People v. Sandoval</i> (1994).....	30 Cal.App.4th 1288, 1302	24
<i>People v. Sandoval</i> (2007).....	41 Cal.4th 825	10, 11,

<i>People v. Sanghera</i> (2006)	139 Cal.App.4th 1567	117
<i>People v. Sargent</i> (1978)	86 Cal.App.3d 150	32, 83
<i>People v. Sayers</i> REVIEW GRANTED TRANSFERRED BACK TO SECOND DISTRICT, DIVISION		
<i>People v. Scheer</i> (1998)	68 Cal.App.4th 1009	84
<i>People v. Schoeb</i> (2005)	132 Cal.App.4th 861	124, 14
<i>People v. Schoppe-Rico</i> (2006)	140 Cal.App.4th 1370	60
<i>People v. Scott</i> (1993)	17 Cal.App.4th 1383	131
<i>People v. Scott</i> (1994)	9 Cal.4th 331	23, 55,
<i>People v. Scott</i> (1996)	14 Cal.4th 544	75
<i>People v. Segura</i> (2008)	44 Cal.4th 921	157
<i>People v. Selga</i> (2008)	Cal.App.4th	129
<i>People v. Selga</i> (2008)	162 Cal.App.4th 113	169
<i>People v. Seminoff</i> (2008)	59 Cal.App.4th 518	171
<i>People v. Serrato</i> (1973)	9 Cal.3d 753	89, 100

<i>People v. Serrato</i> (1988).....	201 Cal.App.3d 761	117
<i>People v. Shabazz</i> (2006).....	38 Cal.4th 55	75
<i>People v. Shadden</i> REVIEW GRANTED (S153233): formerly at: (2007)150 Cal.App.4th 137 4		
<i>People v. Shelton</i> (2006).....	37 Cal.4th 759	157
<i>People v. Shepherd</i> (2007).....	151 Cal.App.4th 1193	126
<i>People v. Short</i> (2008)	160 Cal.App.4th 899	122
<i>People v. Sinclair</i> (2008)	Cal.App.4th	78
<i>People v. Sizemore</i> (2009)	Cal.App.4th	139
<i>People v. Skiles</i> (2010)	Cal.App.4th	93
<i>People v. Skinner</i> (1985).....	39 Cal.3d 765	27
<i>People v. Slattery</i> (2008)	Cal.App.4th	123
<i>People v. Sloan</i> (2007).....	42 Cal.4th 110	101, 10
<i>People v. Smart</i> (2006)	145 Cal.App.4th 1216	76, 81

<i>People v. Smith</i> (1945).....	26 Cal.2d 854	168
<i>People v. Smith</i> (1989).....	211 Cal.App.3d 523	47
<i>People v. Smith</i> (2007).....	150 Cal.App.4th 89	72
<i>People v. Snow</i> (2003)	105 Cal.App.4th 271	143
<i>People v. Sok</i> (2010)	181 Cal.App.4th 88	64, 79
<i>People v. Solis</i> (2001)	90 Cal.App.4th 1002	95, 97
<i>People v. Sorenson</i> (2005).....	125 Cal.App.4th 612	144, 15
<i>People v. Soria</i> (2008)	Cal.App.4th	125
<i>People v. Spirlin</i> (2000).....	81 Cal.App.4th 119	66, 113
<i>People v. Stanphill</i> (2009)	Cal.App.4th	127
<i>People v. Stevens</i> (2007).....	156 Cal.App.4th 357	14
<i>People v. Stewart</i> (2004).....	117 Cal.App.4th 907	148
<i>People v. Strong</i> (2006)	138 Cal.App.4th Supp. 1	140

<i>People v. Stuart</i> (2008)	159 Cal.App.4th 312	17
<i>People v. Stuckey</i> (2009).....	Cal.App.4th	169
<i>People v. Stump</i> (2009).....	Cal.App.4th	42
<i>People v. Sun</i> (2007).....	157 Cal.App.4th 277	77, 83
<i>People v. Superior Court (Brooks)</i>	(2008) 159 Cal.App.4th 1	17
<i>People v. Superior Court (Duval)</i> (1988)	198 Cal.App.3d 1121	31, 83
<i>People v. Superior Court (Kirby)</i> (2003).....	114 Cal.App.4th 287	140
<i>People v. Superior Court (Pomilia)</i> (1991)	235 Cal.App.3d 1464	74
<i>People v. Superior Court (Scofield)</i> (1967).....	249 Cal.App.2d 727	156
<i>People v. Superior Court (Shamis)</i> (1997)	58 Cal.App.4th 833	81
<i>People v. Superior Court (Smith)</i> (S158084)	Nonpublished opinion	166
<i>People v. Takencareof</i> (1981).....	119 Cal.App.3d 492	20
<i>People v. Tanner</i> (2005)	129 Cal.App.4th 223	137, 13
<i>People v. Tarris</i> (2009).....	Cal.App.4th	111

<i>People v. Tassell</i> (1984)	36 Cal.3d 77	9
<i>People v. Taylor</i> (2004)	118 Cal.App.4th 11	57
<i>People v. Thoma</i> (2007).....	150 Cal.App.4th 1096	90
<i>People v. Thompson</i> (2009)	Cal.App.4th	111
<i>People v. Thurman</i> (2005)	125 Cal.App.4th 1453	136
<i>People v. Tillotson</i> (2007).....	157 Cal.App.4th 517	9, 15, 2
<i>People v. Todd</i> (1994).....	30 Cal.App.4th 1724	67
<i>People v. Tokash</i> (2000)	79 Cal.App.4th 1373	84
<i>People v. Torres</i> (2005)	127 Cal.App.4th 1391	37
<i>People v. Torres</i> (2008)	Cal.App.4th	156
<i>People v. Toscano</i> (2004)	124 Cal.App.4th 340	130
<i>People v. Towne</i> (2008)	Cal.4th	19
<i>People v. Townsend</i> (1998).....	62 Cal.App.4th 1390	67

<i>People v. Tran</i> (2009)	Cal.App.4th	110
<i>People v. Trevino</i> (1985)	39 Cal.3d 667	100
<i>People v. Trujillo</i> (2006).....	40 Cal.4th 165	90
<i>People v. Tu</i> (2007) REVIEW GRANTED: formerly at:.....	154 Cal.App.4th 735	12
<i>People v. Turner</i> (2007).....	155 Cal.App.4th 1432	41
<i>People v. Ulloa</i> (2009).....	Cal.App.4th	63
<i>People v. Valdez</i> (2010).....	Cal.App.4th	84
<i>People v. Valencia</i> (2008).....	Cal.App.4th	149
<i>People v. Valenzuela</i> (2009)	Cal.App.4th	149
<i>People v. Vargas</i> (1990)	223 Cal.App.3d 1107	21, 22,
<i>People v. Vargas</i> (2007)	148 Cal.App.4th 644	46
<i>People v. Vasilyan</i> (2009).....	174 Cal.App.4th 443	169
<i>People v. Vasquez</i> REVIEW GRANTED (S141677) formerly at:(2006) 136 Cal.App.4th 898		97

<i>People v. Vega</i> (2005).....	130 Cal.App.4th 183	85
<i>People v. Velasquez</i> (2007)	152 Cal.App.4th 1503	9
<i>People v. Venegas</i> (1970)	10 Cal.App.3d 814	112
<i>People v. Vidaurri</i> (1980).....	103 Cal.App.3d 450	112
<i>People v. Villalobos</i> (2009)	Cal.App.4th	124
<i>People v. Viray</i> (2005).....	134 Cal.App.4th 1186	152
<i>People v. Vu</i> (2006)	143 Cal.App.4th 1009	66, 110
<i>People v. Vy</i> (2004).....	122 Cal.App.4th 1209	57
<i>People v. Walker</i> (1991)	54 Cal.3d 1013	124, 140
<i>People v. Wallace</i> (2003).....	109 Cal.App.4th 1699	169
<i>People v. Wallace</i> (2004).....	120 Cal.App.4th 867	143, 144
<i>People v. Wallace</i> (2004).....	33 Cal.4th 738	51
<i>People v. Waltz</i> (2008).....	160 Cal.App.4th 1364	149
<i>People v. Walz</i> (2008).....	160 Cal.App.4th 1364	148, 149

<i>People v. Wandick</i> (2004).....	115 Cal.App.4th 131	133
<i>People v. Wardell</i> (2008).....	Cal.App.4th	74
<i>People v. Warner</i> (2006).....	39 Cal.4th 548	68
<i>People v. Warner</i> (2007).....	155 Cal.App.4th 57	76
<i>People v. Warner</i> (2008).....	166 Cal.App.4th 653	77, 78
<i>People v. Washington</i> (2002).....	100 Cal.App.4th 590	153
<i>People v. Watts</i> (2005).....	138 Cal.App.4th 959	114
<i>People v. Waymire</i> (2007)	149 Cal.App.4th 1448	4
<i>People v. Weber</i> (2010)	Cal.App.4th	50
<i>People v. Wheeler</i> (2005)	127 Cal.App.4th 873	136, 137
<i>People v. White</i> (1987)	188 Cal.App.3d 1128	85
<i>People v. White</i> (2005)	133 Cal.App.4th 473	75
<i>People v. Williams</i> (1992).....	10 Cal.App.4th 827	41

<i>People v. Williams</i> (1998).....	17 Cal.4th 148	29, 52
<i>People v. Williams</i> (2004).....	120 Cal.App.4th 209	93, 167
<i>People v. Williams</i> (2004).....	34 Cal.4th 397	9, 53, 54
<i>People v. Williams</i> (2007).....	156 Cal.App.4th 898	125
<i>People v. Williams</i> (2009).....	Cal.App.4th	161
<i>People v. Willie</i> (2005)	133 Cal.App.4th 43	144
<i>People v. Wills</i> (2008).....	Cal.App.4th	128
<i>People v. Wilson</i> (2008).....	Cal.App.4th	20
<i>People v. Winson</i> (1981).....	29 Cal.3d 711	126
<i>People v. Winters</i> (2001)	93 Cal.App.4th 273	91
<i>People v. Wood</i> (1998)	62 Cal.App.4th 1262	119
<i>People v. Wood</i> (2000)	83 Cal.App.4th 862	84
<i>People v. Woods</i> (2008).....	Cal.App.4th	123

<i>People v. Wrice</i> (1995)	38 Cal.App.4th 767	132
<i>People v. Wutzke</i> (2002)	28 Cal.4th 923	142
<i>People v. Wynn</i> (2010).....	Cal.App.4th	112
<i>People v. Yanez</i> (1995)	38 Cal.App.4th 1622	122
<i>People v. Yang</i> (2010)	Cal.App.4th	81
<i>People v. Ybarra</i> (2008)	Cal.App.4th	20
<i>People v. Yim</i> (2007)	152 Cal.App.4th 366	9, 17
<i>People v. Zackery</i> (2007).....	147 Cal.App.4th 680	145
<i>People v. Zarazua</i> (2008)	Cal.App.4th	77
<i>People v. Zikorus</i> (1983).....	150 Cal.App.3d 324	165
<i>People v. Zito</i> (1992)	8 Cal.App.4th 736	142, 14
<i>Pompi v. Superior Court</i> (1982)	139 Cal.App.3d 503, 507-508	36
<i>Porter v. Superior Court</i> (2007)	148 Cal.App.4th 889	100
<i>Porter v. Superior Court</i> (2009)	Cal.4th	89, 110

<i>Robert L. v. Superior Court</i> (2003)	30 Cal.4th 894	63
<i>Sons v. Superior Court</i> (2004)	125 Cal.App.4th 110	96
<i>Teague v. Lane</i> (1989)	489 U.S. 288	19
<i>Wilkoff v. Superior Court</i> (1985)	38 Cal.3d 345	167
<i>Williams v. Superior Court</i> (2001)	92 Cal.App.4th 612	91

FEDERAL CONSTITUTION

Article:

V	3
VI.....	1-3, 9, 10, 13-16, 18, 19, 22, 23, 93, 116, 127, 164, 170
VIII	28-31, 33
XIV	3, 30

CALIFORNIA STATUTES

Evidence Code Sections:

1221	90
730	169

Government Code Sections:

10373	151
29550	152
29550.1	152

29550.2	152
70353	151
70372	148, 150
70373	150, 151, 153
76000	146-148, 150
76104.6	149, 150
76104.7	149, 150

Health & Safety Code Sections:

11019	35
11055	118
11350	118
11351.5	71
11352	85, 114
11353.6	67
11357	129
11358	117
11366	133
11368	136
11370.1	135
11370.4	85
11372	85, 86, 147

11380	14
11470.1	121
11470.2	121
25189.5	111

Penal Code Section:

17	117, 119
69	97
148	109, 130, 137
168.22	101
186.10	86
186.22	55-66, 78-81, 86, 87, 101, 104, 106, 110, 113, 115, 120
186.30	56
187	110
190.2	75
209.5	99
213, subd.(a)(1)(A)	88
213, subdivision (a)(1)(A)	88
213, subdivision (a)(1)(B)	88
213, subdivision (b)	170

243	97, 102
245	59, 63, 78, 84, 102
246	63-65, 76, 80
246.3	65
266h	99
266i	99
266j	99
273.5	38, 101, 102
273a	66
2800.2	61, 93, 94, 109, 167
288	68, 128, 132, 141, 166
289	163
290	30, 32-34, 141, 149, 158-160, 163

290.3	148
290, subdivision (a)(1)(A)	162
136.1	82
136.2	169
1376	28, 30
1023	88, 89, 101, 110
1118	96
1118.1	101
11359	106
11366	106
11378	106
1164	39
1170	11, 20, 22, 23, 65, 108, 113, 126, 135, 156, 157
1170.1	15, 24, 56, 63, 69, 79, 87, 109, 131

1170.19	115	
1181	89, 99, 110	
1191.1	165, 166	
1192.5	165	
1192.7	56, 57, 63, 67, 68, 78, 82	
1200	164, 165	
1202.4	120-122, 124, 125, 132, 145, 146, 148-150, 152	
1202.44	120	
1202.45	125, 146, 148	
1202.5	147, 150, 152	
12021	56, 66, 71, 98, 113, 117	
12022	24, 26, 31, 37, 38, 54, 63-66, 71-84, 94-97, 101-104, 107, 108, 112, 113,	118, 11
12022.7	84	

12025	56, 60, 98
1203	116
1203.066	128, 140
1203.097	129
1203.1	111, 129, 148, 150
1203.2	36, 125
1203.4	132
12031	58, 60, 109, 115
1204	165
1210	135, 136
1210.1	134, 135, 137, 139, 140
12101	167
1214	144
12220.1	138

1237.5	17
1260	99
1265.7	148
1385	50-55, 70, 72, 133
1464	146-148, 150
1465.7	146, 147, 150
1465.8	153
1465.8	125, 143, 144, 147, 148, 150
21031	98
2900.5	40, 41, 43, 44, 48
2933	35, 38, 40
2933.1	36-40
2933.2	40
2933.5	37

2935	47
296	155
3046	64
311.11	168
314.1	94, 167
4.433	135
4019	35, 39, 40, 43, 44, 47-50
422.7	169
4502	25
451.1	108
4532	26
470	105, 169
484g	117

496	118, 166
597	72
646.9	105, 167
647	28
654	38, 40, 52, 58, 59, 63, 65, 66, 71, 82, 85, 93-114, 145, 147, 167, 170
664	110
667	23, 37, 47, 56, 68, 70, 79, 100, 108, 131, 155, 156
667.5	23, 34, 36, 37, 39, 53, 54, 69-71, 78, 104
667.6	25, 27, 142
667.61	12, 24, 79, 109, 140-143, 155
667.71	143
667.9	12
669	76
803	87

954 99, 1021000128, 129, 134, 140

Vehicle Code Section:

10851	94
1385	133
20001	84, 87, 107, 121
20003	107
23152	42, 135

Welfare and Institutions Code Section:

730.6	121, 122
731	52, 157
3051	35
3053	36

CALIFORNIA RULES OF COURT

Rules:

4.406	35
4.413	117
4.421	14, 17, 27, 104
4.424	112
4.425	26
4.435	127
8.54	45

